# Jurisdictional Statement

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IN THE

# Supreme Court of The United States

OCTOBER TERM, 1981

No. .....

FORD MOTOR CREDIT COMPANY
AND
YATES FORD, INC.,

*Appellants,*

vs.

ARNULFO R. ZAPATA,

*Appellee.*

## APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED

1. Is the decision of the Texas Supreme Court in *Zapata* v. *Ford Motor Credit Company* in conflict with the Due Process Requirements of the Federal Constitution, as those requirements are applied by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964)?

2. Can Article 5069-7.07(4) of the Texas Consumer Credit Code, which prohibits contractual waivers of rights of action for illegal acts committed in a repossession, be constitutionally extended by court construction to prohibit waivers of rights of action for conduct arising subsequent to a repossession?

# TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Opinions Below | 2 |
| Jurisdictional Grounds of this Appeal | 2 |
| Constitutional and Statutory Provisions Involved | 2 |
| Statement of the Case | 3 |
| Substantiality of the Federal Question Involved | 7 |
| I. Introductory Statement | 8 |
| II. The Decision of the Texas Supreme Court in *Zapata* Is in Direct Conflict with the Due Process Requirements of the Federal Constitution as Those Requirements Are Applied by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964) | 10 |
| A. By expanding the conduct prohibited by the Texas Consumer Credit Code to encompass conduct not clearly prescribed thereunder, the decision of the Texas Supreme Court contravenes the due process clause and results in the statutory provision being unconstitutional as applied | 10 |
| B. Resort to the concept of trespass ab initio to interpret a penal statute so as to render illegal conduct not otherwise within the scope of the statute contravenes the notice requirements of due process | 12 |
| C. The decision of Texas Supreme Court is contrary to this Court's decision in Bouie v. City of Columbia | 16 |
| III. The Texas Supreme Court's Decision in *Zapata* Throws Open to Attack Tens of Thousands of Retail Installment Contracts | 26 |
| Conclusion | 28 |

# INDEX TO APPENDICES


| | Page |
|---|---|
| Appendix A. Opinion of the Texas Supreme Court, dated May 6, 1981 | A-1 |
| Appendix B. Opinion of the Court of Civil Appeals of Texas, Beaumont, dated August 14, 1980 | B-1 |
| Appendix C. Final Judgment of the 53rd Judicial District Court of Travis County, Texas, dated July 10, 1979 | C-1 |
| Appendix D. Notice of Appeal to the Supreme Court of the United States, dated August 3, 1981 | D-1 |
| Appendix E. Texas Consumer Credit Code, Chapter Seven, governing Motor Vehicle Installment Sales | E-1 |
| Appendix F. Texas Automobile Retail Installment Contract Form | F-1 |
| Appendix G. Affidavit of Embree Hulsey, dated April 4, 1979 | G-1 |
| Appendix H. Subsidiaries of Ford Motor Company | H-1 |

# INDEX OF AUTHORITIES

Page

**Cases**

A. B. Small Co. v. American Sugar Refining Co. 267 U.S. 233 (1924) ..... 18

Anderson Brothers Ford v. Valencia, 49 U.S.L.W. 4635 (U.S. June 8, 1981) ..... 27

Bouie v. City of Columbia, 378 U.S. 347 (1964) ..... 7, 10, 12, 16-22, 23-25

Bundrick v. First Nat'l Bank, 570 S.W.2d 12 (Tex. Civ. App. – Tyler 1978, writ ref'd n.r.e.) ..... 18

Burnet v. Wells, 289 U.S. 670 (1932) ..... 16

Coffee City v. B. J. Thompson, 535 S.W.2d 758 (Tex. Civ. App. – Tyler 1976, writ ref'd n.r.e.) ..... 12

Cohen v. California, 403 U.S. 15 (1970) ..... 7

Commerce Trust Co. v. Best, 80 S.W.2d 942 (Tex. 1935) ... 18

Connally v. General Construction Co., 269 U.S. 385 (1925) ..... 12, 17, 19

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) ..... 7

First State Bank of Bedford v. Miller, 563 S.W.2d 572 (Tex. 1978) ..... 18

Ford Motor Credit Company v. B. L. Long, No. 8518 App. – Beaumont, Oct. 23, 1980 writ ref'd n.r.e.) ..... 18

Goodbody & Co. v. McDowell, 530 F.2d 1149 (5th Cir. 1976) 15

Grayned v. City of Rockford, 408 U.S. 104 (1972) ..... 26

Gulf, Colorado & S.F. Ry. Co. v. Dwyer, 84 Tex. 194, 19 S.W.2d 470 (Tex. 1892) ..... 18

Hight v. Jim Bass Ford, 552 S.W.2d 490 (Tex. Civ. App. – Austin 1977, writ ref'd n.r.e.) ..... 18

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1978) ..... 7

Lanzetta v. New Jersey, 306 U.S. 451 (1938) ..... 17, 19

McBoyle v. United States, 283 U.S. 25 ..... 25

Page

Missouri K & T Ry. Co. of Texas v. State, 100 Tex. 420, 100 S.W. 766 (1907) ..... 12

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) .. 11, 12

Perry v. Leuttich, 121 S.W. 2d 332 (Tex. 1938) ..... 18

Satterfield v. Satterfield, 448 S.W.2d 456 (Tex. 1909) ..... 18

Simpson v. Phillips Pipe Line Co., 603 S.W.2d 307 (Tex. Civ. App. – Beaumont 1980, writ ref'd n.r.e.) ..... 14-16

Smith v. Goguen, 415 U.S. 566 (1974) ..... 27

Snell v. Short, 544 F.2d 1289 (5th Cir. 1977) ..... 15

Southwestern Bell Telephone Co. v. Commercial Metals Co., 389 S.W.2d 116 (Tex. Civ. App. – Houston 1965, no writ) 15

Taylor v. Watson & Co., Inc., 502 S.W.2d 613 (Tex. Civ. App. – Dallas 1973, writ ref'd n.r.e.) ..... 15

Tenneco Oil Co. v. Padre Drilling Co. 453 S.W.2d 814 (Tex. 1970) ..... 18

United States v. Harriss, 347 U.S. 612 (1953) ..... 17

U.S. v. Wiltberger, 18 U.S. (5 Wheat.) 593 (1820) ..... 25

Van Zandt v. Ft. Worth Press, 359 S.W.2d 893 (Tex. 1962) .. 18

**Statutes**

U.S. CONST., amend XIV, § 1 ..... 1

28 U.S.C. § 1257(2) ..... 2, 7

28 U.S.C. § 2403(b) ..... 3

Tex. Rev. Civ. Stat. Ann., Art. 5069-7.01 et seq. ..... 2, 4

Tex. Rev. Civ. Stat. Ann., Art. 5069-7.07(4) ..... 2-9, 11-13, 15-16, 20-21, 23-24, 27

Tex. Rev. Civ. Stat. Ann., Art. 5069-7.07(7) ..... 23, 25

Tex. Rev. Civ. Stat. Ann., Art. 5069-8.01 ..... 8

Tex. Rev. Civ. Stat. Ann., Art. 5069-14.01 et seq. ..... 4

**Articles and Treaties**

75 Am. Jur.2d, *Trespass* § 17, at 21 (1974) ..... 14

| | Page |
|---|---|
| 1 Harper & James, *The Law of Torts*, § 1.21 at 58 (1956) | 15 |
| Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897) | 15 |
| W. Prosser, *Law of Torts*, § 25 at 129-31 (4th Ed. 1971) | 16 |
| *Restatement (Second) of Torts*, § 214(2) (1965) | 14-16 |
| Williams, *A Strange Offspring of Trespass ab Initio*, 52 L.Q. Rev. 106 (1936) | 15 |
| Wright and Miller, *Federal Practice and Procedures*, § 4012, at 609 | 7 |

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ARNULFO R. ZAPATA,

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## APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

## JURISDICTIONAL STATEMENT

Pursuant to Rules 12 and 15 of the Rules of the Supreme Court of the United States, Appellants Ford Motor Credit Company[1] and Yates Ford, Inc., file this Statement of the basis upon which this Court has jurisdiction to review the

[1] Ford Motor Credit Company is a wholly owned subsidiary of Ford Motor Company. All subsidiaries of Ford Motor Credit Company are either wholly owned by Ford Motor Credit Company or are wholly owned by Ford Motor Credit Company and other subsidiaries of Ford Motor Company. Ford Motor Credit Company may be considered an affiliate of the subsidiaries of Ford Motor Company listed in Appendix H. Co-Appellant Yates Ford, Inc. has no affiliates or subsidiaries.

final judgment of the Supreme Court of the State of Texas in this case, and why this Court should exercise that jurisdiction herein.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Texas is reported at 615 S.W.2d 198 (1981) and is reprinted in Appendix A. The opinion of the Court of Civil Appeals for the Ninth Supreme Judicial District at Beaumont, Texas, is reported at 605 S.W.2d 362 and is reprinted in Appendix B. The Final Judgment entered by The Honorable James F. Dear, Jr., in the 53rd District Court of Travis County, Texas, appears at Volume 951, page 703 of the Minutes of that Court, and is reprinted in Appendix C.

## THE JURISDICTIONAL GROUNDS

This is a civil suit concerning the imposition of statutory penalties under the Texas Consumer Credit Code to a motor vehicle installment sale transaction. Tex. Rev. Civ. Stat. Ann., Art. 5069-7.01 et. seq. The opinion of the Texas Supreme Court awarding such penalties was rendered on May 6, 1981. On May 21, 1981, Appellants filed their Motion for Rehearing, which was denied on June 3, 1981. Appellants' Notice of Appeal, reprinted in Appendix D, was filed with the Clerk of the Texas Supreme Court on August 4, 1981. The appellate jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Texas statute at issue herein is Section 7.07(4) of the Texas Consumer Credit Code, Article 5069, Tex. Rev. Civ. Stat. Ann. (1974), which provides as follows:

> "No retail installment contract or retail charge agreement shall: . . . .

> (4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle."

The full text of Chapter Seven of the Consumer Credit Code, as it existed at the time of the transaction at issue, is reprinted in Appendix E.

As construed and applied by the Texas Supreme Court, Art. 5069-7.07(4) of the Texas statute violates the Due Process Clause of Section I, of the Fourteenth Amendment of the United States Constitution, which states as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law . . . ."[2]

## STATEMENT OF THE CASE

On July 15, 1976, Arnulfo R. Zapata ("Zapata") purchased a new pick-up truck from Yates Ford, Inc., of Austin, Texas, financing the purchase by executing a Retail Installment Contract (hereafter referred to as the "contract"). A copy of a blank contract of a form identical to that executed by Zapata is attached as Appendix F. The contract was assigned to Ford Motor Credit Company ("Ford Credit") on July 19, 1976, and Zapata was subsequently notified of the assignment. Two years later, Zapata

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[2] Pursuant to Rule 28(c), this Court is hereby advised that 28 U.S.C. § 2403(b) may be applicable. Copies of Appellants' Notice of Appeal and this Jurisdictional Statement have been served on the office of the Attorney General for the State of Texas.

filed this suit against Ford Credit and against Yates Ford, alleging six separate violations of the Texas Consumer Credit Code, Tex. Rev. Civ. Stat. Ann., Art. 5069, Chapters 7 and 14.

Zapata subsequently moved for Partial Summary Judgment against Ford Credit and Yates Ford. The Trial Court granted that motion, finding the Defendants jointly and severally liable and ordering payment of a statutory penalty in the amount of $2,000.00. After a trial on the issue of attorneys' fees, the Trial Court entered final judgment for Zapata on July 10, 1979, granting the $2,000.00 statutory penalty, plus attorneys' fees in the amount of $5,000.00, interest, and court costs. (Appendix C) Those penalties were awarded even though Zapata had suffered no actual damages as a result of any of the alleged Credit Code violations. Ford Credit and Yates Ford both appealed from that judgment, which appeals were subsequently consolidated.

The Texas Court of Civil Appeals reversed the District Court, finding that no statutory violations existed. (Appendix B) The Texas Supreme Court subsequently granted a writ of error, limited to the Court of Civil Appeals' holding on two of the six alleged statutory violations. Those alleged violations concerned two separate provisions of the contract: a clause dealing with the status of personal property in an automobile that has been repossessed (the issue involved in this appeal); and a clause concerning physical damage insurance. In its opinion, the Texas Supreme Court found that the contract clause concerning personal property (the "personalty provision") violated Art. 5069-7.07(4) of the Credit Code, because it amounted to a prohibited waiver of a buyer's right of action for illegal acts committed in the repossession of collateral. The Texas Supreme Court therefore reversed the judgment of the

Court of Civil Appeals, and reinstated the statutory penalties.[3] (Appendix C)

In the trial court and the Texas Court of Civil Appeals below, Appellants argued that as a matter of contract construction the personalty provision did not amount to a waiver of a buyer's right of action for any illegal acts. Appellants further argued that even if there was a waiver present, it was not the type of waiver prohibited by Art. 5069-7.07(4) because it related only to post-repossession acts. The pertinent part of Art. 5069-7.07(4) prohibits only waivers involving illegal acts *committed in* a repossession. Appellants further argued, by way of a separate point of error to the Court of Civil Appeals, that Art. 5069-7.07(4) would be rendered unconstitutionally vague if extended by court construction to cover waivers involving acts *committed after* a repossession.[4] The Court of Civil Appeals found that as a matter of contract construction the contract language did not amount to any waiver of a right of action for an illegal act. (Appendix B-4) That Court therefore reversed the trial court's judgment on the Art. 5069-7.07(4)

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[3] As a result of the Supreme Court's decision on the personalty clause, it did not reach or decide the issue of the second alleged Credit Code violation.

[4] The Points of Error raised by Appellants in the Court of Civil Appeals are:

**SIXTH POINT OF ERROR**

**The trial court erred in granting judgment for the appellee because the "Personalty" provision of the contract does not waive the buyer's rights of action against the seller or holder for any illegal act committed in the collection of payments or in the repossession of the collateral.**

**SEVENTH POINT OF ERROR**

**The trial court erred in granting judgment for the appellee because Tex. Rev. Civ. Stat. Ann., Art. 5069-7(4) is unconstitutionally vague if applied to penalize post-repossession activities.**

issue, without the necessity of reaching the Appellants' constitutional argument.

Thereafter, Zapata petitioned the Texas Supreme Court for a Writ of Error. In reply, Appellants reasserted both the contract construction and constitutional arguments noted above.[5] The Supreme Court held that the personalty provision was indeed a waiver of a right of action for an illegal act, and that Art. 5069-7.07(4) could be applied to waivers concerning post-repossession acts. That Court made no mention of the constitutional problems presented by its extension of the statute. Appellants' constitutional argument was again asserted by specific Assignments of Error in its Motion for Rehearing to the Texas Supreme Court.[6] That Motion was denied without a further opinion.

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[5] The Reply Points made by Appellants to the Texas Supreme Court are:

**FIRST REPLY POINT**

**The Court of Civil Appeals correctly rendered judgment for respondents because the "Personalty" provision of the contract in question does not waive the buyer's rights of action against the seller or holder for any illegal act committed in the collection of payments or in the repossession of the collateral.** (In Reply to Petitioner's Point of Error 2)

**SECOND REPLY POINT**

**The Court of Civil Appeals correctly rendered judgment for respondents because Tex. Rev. Civ. Stat. Ann., Art. 5069-7.07(4) is unconstitutionally vague if applied to penalize post-repossession activities.** (In Reply to Petitioner's Point of Error 2)

[6] Appellants' Assignments of Error raised in their Motion for Rehearing to the Texas Supreme Court are:

**ASSIGNMENT OF ERROR ONE**

**This court erred in reversing the judgment of the Court of Civil Appeals because the theory of Trespass Ab Initio has been repudiated in Texas.**

It is clear that "once the validity of the statute is properly drawn in question . . . a state court cannot avoid a decision in favor of its validity by merely ignoring the question. Silent rejection of the question is effective as a decision in favor of validity . . ." Wright and Miller, *Federal Practice and Procedure,* § 4012, at 609. The Appellants' contention that the statute was unconstitutional as applied has therefore been rejected by the highest Texas Court in which review can be had. *See also, Cohen* v. *California,* 403 U.S. 15 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 440 (1979). Appellants therefore invoke the appellate jurisdiction of this Court under Title 28 U.S.C. Section 1257(2).

## SUBSTANTIALITY OF THE FEDERAL QUESTION INVOLVED

This Statement will show that the decision of the Texas Supreme Court: (1) is in direct conflict with the Due Process requirements of the Federal Constitution, as those requirements are applied by this Court in *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964); and (2) renders so uncertain the requirements of the Texas Consumer Credit Code applicable to retail installment credit transactions as to throw open to attack tens of thousands of retail installment contracts.

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Footnote [6] continued:

**ASSIGNMENT OF ERROR TWO**

**This court erred in reversing the judgment of the Court of Civil Appeals because Art. 5069-7.07(4), as construed in *Zapata,* denies respondents due process of law by failing to give adequate notice that it applies to waivers of causes of action for illegal events occurring after, rather than in, a repossession.**

# I.

## INTRODUCTORY STATEMENT

This case involves the application of the Texas Consumer Credit Code. The Code was enacted in 1967 to regulate credit transactions within the state. Section 7 of the Code specifically applies to and regulates motor vehicle installment sales.

The Code is analogous to the Federal Truth-in-Lending Act in that it imposes certain disclosure duties on creditors and provides for statutory penalties for any violation. The penalty for violating the Code is generally twice the amount of interest or time-price differential involved in a given installment transaction, plus the plaintiff's attorneys' fees. Art. 5069-8.01. Such penalties are imposed without a requirement that any harm be suffered by the individual debtor-plaintiff.

The Credit Code not only establishes specific disclosure requirements, but also prohibits contracts from containing certain provisions. One of those "prohibited provision" sections is at issue in this case. That section, Art. 5069-7.07(4), provides in pertinent part that no retail installment contract shall "[p]rovide for a waiver of the buyer's rights of action against the seller or holder . . . for any illegal act committed . . . *in* the repossession of a motor vehicle." (emphasis added)

The portion of the retail installment contract at issue containing the allegedly prohibited provision is as follows:

> "Any personalty in or attached to the Property (the vehicle made the subject of the contract) when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession." (parenthetic added)

No actual or threatened repossession was involved in this case. Indeed, it is undisputed that Appellant Ford Credit's policy is to consistently attempt to return any personalty discovered in a repossessed vehicle, even absent a demand on the part of the debtor.[7] Nonetheless, on July 10, 1979, the 53rd District Court of Travis County, Texas, entered final judgment ruling that that clause violated Section 7.07(4) of the Texas consumer credit statute. On August 14, 1980, the Court of Civil Appeals reversed that holding, ruling that the foregoing contract language did not amount to a waiver of a right of action for an illegal act committed in a repossession. (Appendix B) The Texas Supreme Court subsequently granted writ of error, and on May 6, 1981, reversed that holding of the Texas Court of Appeals. (Appendix A) As a result, the Credit Code penalties were reimposed on Appellants in this case, and all retail installment contracts containing the personalty provision at issue were placed in jeopardy.

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[7] Ford Credit's policy and procedures regarding such personalty is outlined in an affidavit filed with the trial court and included in the official record to the Texas Supreme Court and Court of Civil Appeals below. The pertinent portion of that Affidavit, executed on April 4, 1979 by Embree Hulsey, Ford Credit's Assistant Branch Manager at the branch office which handled the Zapata account, is reprinted in Appendix G herein.

## II.

## THE DECISION OF THE TEXAS SUPREME COURT IN *ZAPATA* IS IN DIRECT CONFLICT WITH THE DUE PROCESS REQUIREMENTS OF THE FEDERAL CONSTITUTION, AS THOSE REQUIREMENTS ARE APPLIED BY THIS COURT IN *BOUIE V. CITY OF COLUMBIA*, 378 U.S. 347 (1964)

### A. By expanding the conduct prohibited by the Texas Consumer Credit Code to encompass conduct not clearly proscribed thereunder, the decision of the Texas Supreme Court contravenes the due process clause and results in the statutory provision being unconstitutional as applied.

The Texas Supreme Court decision in *Zapata* recognized that the personalty clause at issue contains two parts. The Court held that the first part of the contract clause, which provides that "[a]ny personalty in or attached to the property when repossessed may be held by seller without liability . . ." merely described a bailor-bailee relationship and as such does no more than restate the common law and Uniform Commercial Code rights of a creditor to take possession of personal property located in a repossessed vehicle and hold that property for the owner. The Texas Supreme Court therefore correctly found that the portion of the contract's personalty provision did not violate the Code. (Appendix A-4) More importantly, in upholding that portion of the provision, the Texas Supreme Court recognized that the act of taking possession of personal property located in a lawfully repossessed vehicle was *not* an illegal act *at the time* the vehicle was repossessed.

The Court held, however, that the second part of the personalty provision, which waives claims to such personal property if written demand is not made within 24 hours, amounted to a waiver of a buyer's right of action for a

subsequent wrongful detention of such property, and that such a waiver violated Art. 5079-7.07(4)'s prohibition against waivers of illegal acts committed *"in"* a reposession. The Texas Supreme Court noted that because the contract language obligated the secured party to return any seized personalty if written demand is made "within twenty-four hours after repossession," the only complaint could be that the contract waived the buyer's rights of action if the seller retains the property after the buyer fails to make a timely demand for its return. (Appendix A-4/5) The Court thus clearly recognized that such a detention of personal property could not occur *"in* the repossession of a motor vehicle," but only *after* the repossession had taken place. While the Texas Supreme Court recognized that the plain words of the statute only forbid waivers of claims for acts or events occurring *"in"* the repossession itself, (Appendix A-5), the Court nonetheless held that the statute would be applied to render the contract language illegal. In doing so, the Texas Supreme Court disregarded the express language of Art. 5069-7.07(4) itself, and re-wrote that statute so that it prohibited not only waivers of claims for illegal acts committed during a repossession, but also waivers of claims for acts occurring subsequent to a repossesssion.

Appellants submit that such an extention of Art. 5069-7.07(4) was constitutionally improper.[8]

It is fundamental that the due process clause of the Fourteenth Amendment requires that any statute creating an offense must be sufficiently explicit to inform those subject to it what conduct is prohibited. *Papachristou* v.

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[8] Appellants continue to adhere to their position that as a matter of contract construction the clause at issue does not amount to a waiver of a right of action for any act. For purposes of the constitutional issue involved in this Appeal, however, it will be assumed that the clause does amount to a waiver.

*City of Jacksonville,* 405 U.S. 156 (1972); *Missouri K & T Ry. Co. of Texas* v. *State,* 100 Tex. 420, 100 S.W. 766, 767 (1907). If a statute fails to give adequate notice of forbidden conduct, it is unconstitutional and void. *Coffee City* v. *B. J. Thompson,* 535 S.W.2d 758, 763 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.). The Courts have held that the constitutionally required notice is inadequate if a statute:

> ". . . either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

*Connally* v. *General Construction Co.,* 269 U.S. 385, 391 (1926). Moreover, if a statute is unexpectedly broadened by a judicial construction that makes unlawful conduct that had not appeared to be prohibited, and, as so construed, is applied to a pre-existing offense, it deprives those subject to the statute of due process of law. *Bouie* v. *City of Columbia,* 378 U.S. 347, 352 (1964).

To interpret Art. 5069-7.07(4) so broadly as to encompass waivers concerning acts committed after a repossession renders the statute unconstitutional as applied, because it gives no notice that it applies to acts committed after a repossession.

**B. Resort to the archaic concept of *trespass ab initio* to interpret a penal statute so as to render illegal conduct not otherwise within the scope of the statute contravenes the notice requirements of due process.**

It is of utmost importance to note that the "illegal act" found to have been waived by the Texas Supreme Court was *not* the act of taking possession of the property *during the course of* a repossession, but rather the *subsequent* retention of such property after possession had been law-

fully obtained. It is clear that such a waiver could not, by any normal method of statutory construction, be construed to be a waiver of claims for acts committed during a repossession — the only waivers prohibited by the Texas Credit Code provision involved. In its effort to bring this waiver within the framework of the statutory proscription, the Court found it necessary to resort to the archaic legal fiction of "trespass ab initio." As described in the Texas Supreme Court's opinion, the fiction of *trespass ab initio* characterizes a subsequent wrongful detention of personalty by one originally in lawful possession as a trespass from the time of the original possession itself. Therefore, the Texas Court held that *trespass ab initio* provided the bridge whereby contract clauses containing only a waiver of claims for acts occurring subsequent to a lawful repossession could be punished under Art. 5069-7.07(4), which prohibits only waivers of claims for acts committed in a repossession.

The Court's reliance upon the fiction of *trespass ab initio* only exacerbates the constitutional infirmity arising from the extension of Art. 5069-7.07(4). During the past century, the doctrine of *trespass ab initio* has become a doctrine of ill repute in the law. In 1897, Justice Holmes wrote of the doctrine:

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imulation of the past. I am thinking of the technical rule as to *trespass ab initio* . . . ." (emphasis in original)

Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897).

Indeed, prior to the decision below, the theory of *trespass ab initio* had been repudiated by Texas, as well as by most modern courts. *See, W. H. Simpson* v. *Phillips Pipe Line Co.*, 603 S.W.2d 307 (Tex. Civ. App. — Beaumont 1980, writ ref'd n.r.e.). In *Simpson*, the trial court had refused to apply the doctrine of *trespass ab initio*, and plaintiffs appealed. In approving the lower court's rejection of *trespass ab initio*, the Court of Civil Appeals noted the scant and aged case law which was asserted as its precedential basis in Texas. *See*, 603 S.W.2d at 309-10. The Court then discussed the longstanding and uniform disfavor with which the fiction has been viewed, in Texas and in all other jurisdictions. For example, the Court quoted 75 Am. Jur. 2d, *Trespass* § 17, at 21 (1974), as follows:

> "The doctrine of trespass ab initio has been called 'a curious and unique fiction,' and has been vigorously denounced by writers who have discussed it. The Restatement of Torts has rejected the doctrine."

The rejection of *trespass ab initio* in the *Restatement (Second) of Torts*, § 214(2) (1965) was also cited:

> "One who properly enters land in the exercise of any privilege to do so, and thereafter commits an act which is tortious, is subject to liability only for such tortious act, and does not become liable for his original lawful entry, or for his lawful acts on the land prior to the tortious conduct."[9]

The *Simpson* Court then referred to the Official Comment to § 214 of the *Restatement (Second) of Torts*, which

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[9] The *Restatement* also rejects the doctrine of *trespass ab initio* in the context of conversion or other interferences with a possessory interest in chattels. *See* §278(2), at 507; *see also*, Official Comment (2) at 508.

described *trespass ab initio* as a "peculiar and anomalous fiction," and which noted at p. 409 that:

> "Since 1900 the weight of authority has rejected trespass ab initio, and there have been very few cases in which it has been applied."

The repudiation of *trespass ab initio* in Texas is not limited to the *Simpson* case. The fiction has also been excised from Texas jurisprudence for statute of limitations purposes. *See, Southwestern Bell Telephone Co.* v. *Commercial Metals Co.*, 389 S.W.2d 116 (Tex. Civ. App. — Houston 1965, no writ); *Taylor* v. *Watson & Co., Inc.*, 502 S.W.2d 613 (Tex. Civ. App. — Dallas 1973, writ ref'd n.r.e.); *see also, Snell* v. *Short*, 544 F.2d 1289 (5th Cir. 1977); and *Goodbody & Co.* v. *McDowell*, 530 F.2d 1149 (5th Cir. 1976).

In sum, Texas courts rejected the doctrine of *trespass ab initio* long before *Zapata* was decided. Yet, despite its discredited and repudiated status, the Texas Supreme Court based its interpretation on Art. 5069-704(4) exclusively on that doctrine. That fact only heightens the constitutional problem at issue. In order to know that contract language falling outside the plain meaning of Art. 5069-7.07(4) could be proscribed thereunder, the contract drafter, if he considered a waiver of property rights to be a waiver of an illegal act in the first place, would have had to foresee the retroactive application of a medieval legal fiction which has been variously characterized as "outworn,"[10] "peculiar and anomalous,"[11] "capricious,"[12] "revolting,"[13] "treacherous,"[14] and "on its way to oblivion."[15] He would then have

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[10] *Simpson v. Phillips Pipeline, supra*, at 311.

[11] *Restatement (Second) of Torts*, Official Comment to § 214(2).

[12] Williams, *A Strange Offspring of Trespass Ab Initio*, 52 L.Q. Rev. 106 (1936).

[13] Holmes, *The Path of the Law, supra.*

[14] 1 Harper & James, *The Law of Torts*, § 1.21 at 297 (1956).

to ignore the fact that the fiction has been repudiated by the vast majority of American jurisdiction,[16] and by the only cases to reach the Texas Supreme Court in modern times.[17] He would also have to anticipate that the fiction would be applied not merely to evaluate an actual tort, but for the novel purpose of construting a penal statute. Certainly, nothing in the statute warrants such remarkable prescience.

Therefore, the Texas Supreme Court was not at liberty to give Art. 5069-7.07(4) the interpretation set out in the *Zapata opinion.* To do so gives so little notice of the application of that penal statute as to render it unconstitutionally vague and therefore void.[18]

### C. The decision of Texas Supreme Court is contrary to this Court's decision in *Bouie* v. *City of Columbia.*

The constitutional problem raised by the *Zapata* case is strikingly like that corrected by the United States Supreme Court's decision in *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964). In *Bouie,* the issue was the enforcement of a trespass statute which prohibited "entry upon the lands of another . . . . after notice from the owner or tenant prohibiting such entry . . . ." Two defendants were charged with violating that statute, even though they did not receive notice to leave until after they had entered the premises.

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[15] W. Prosser, *The Law of Torts,* § 25 at 129-31 (4th ed. 1971.)

[16] *Restatement (Second) of Torts,* § 214(2), *supra.*

[17] *Simpson* v. *Phillip Pipeline, supra; Taylor v. Watson & Co., supra.*

[18] It does not matter whether the *Zapata* opinion is characterized as extending the scope of Art. 5069-7.07(4) beyond its literal terms so that "committed in" includes "committed after," or as redefining by resort to fiction one's behavior so as to bring it within the literal terms of Art. 5069-7.07(4). Under either characterization, the same failure to give notice of what behavior is prohibited by the statute is involved, and the same constitutional issue is presented. *See, Burnet v. Wells,* 289 U.S. 670, 677-8 (1932) (Cardoza, J.)

The South Carolina Supreme Court upheld their convictions, construing the trespass statute ". . . . to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave." That construction was challenged as violating the due process clause by failing to give fair warning of the conduct which was prohibited.

The United States Supreme Court agreed with that constitutional claim. The Court first noted that the due process clause required the penal statute before it to give fair notice of what it prohibited, as follows:

> "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court. As was said in *United States* v. *Harriss*, 347 U.S. 612, 617:
>
> > 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'
>
> Thus we have struck down a state criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' *Connally* v. *General Const. Co.*, 269 U.S. 385, 391. We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law,' *ibid.*, and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' *Lanzetta* v. *New Jersey*, 306 U.S. 451, 53.4 (footnote omitted)

378 U.S. at 350-51.

The same constitutional principles discussed in *Bouie* apply to the penal statute at issue here, which imposes fines in civil proceedings.[19] *See, e.g., A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239 (1924)

The Supreme Court in *Bouie* then noted that in most of its prior "void-for-vagueness" decisions, the fatal uncertainty resulted from vague or overbroad language in the statute itself. On its face, however, the South Carolina trespass law was "admirably narrow and precise" (i.e., the statute applied only to "entry upon lands of another . . . . after notice . . . . prohibiting such entry . . . ."). 378 U.S. at 351-2. Rather, the fatal uncertainty in the trespass statute arose not from the statute itself, but from the "unforeseeable and retroactive expansion of the narrow and precise" statute by the South Carolina Supreme Court. 378 U.S. at 352. Thus, the statute was rendered unconstitutionally vague *as applied*. The Court recognized that that

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[19] The Texas Courts have recognized that the Consumer Credit Code is a penal statute. *See, Bundrick* v. *First Nat'l Bank*, 570 S.W.2d 12, 17 (Tex. Civ. App. – Tyler 1978, writ ref'd n.r.e.); *Hight v. Jim Bass Ford*, 552 S.W.2d 490, 491 (Tex. Civ. App. – Austin 1977, writ ref'd n.r.e.); *Ford Motor Credit Company v. B. L. Long*, 608 S.W.2d 293 (Tex. Civ. App. – Beaumont 1980, writ ref'd. n.r.e.).

Those decisions are consistent with a long line of Texas Supreme Court decisions which have held that any statute which authorizes damages beyond the amount necessary to compensate for actual harm or provides for attorney's fees is penal in nature. *First State Bank of Bedford v. Miller*, 563 S.W. 2d 572, 577 (Tex. 1978); *Tenneco Oil Co. v. Padre Drilling Co.*, 453 S.W.2d 814, 818 (Tex. 1970); *Van Zandt v. Ft. Worth Press*, 359 S.W.2d 893 (Tex. 1962); *Perry v. Leuttich*, 121 S.W.2d 332, 333 (Tex. 1938). It is also well established that penal statutes are to be narrowly construed. *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1909); *Commerce Trust Co. v. Best*, 80 S.W.2d 942, 947 (Tex. 1935). Any doubt as to the coverage of such a statute must be resolved in favor of the defendant. *Gulf, Colorado & S.F. Ry. Co. v. Dwyer*, 84 Tex. 194, 19 S.W.2d 470 471 (Tex. 1892).

was an even greater constitutional affront than overbroad statutory language itself, stating as follows:

> "The thrust of the distinction, however, is to produce a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforseeably and retroactively expanded by judicial construction, than in the typical 'void for vagueness' situation. When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. If the Fourteenth Amendment is violated when a person is required 'to speculate as to the meaning of penal statutes,' as in *Lanzetta*, or to 'guess at the statute's meaning and differ as to its application,' as in *Connally*, the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question."

378 U.S. at 352. Indeed, the Court further noted that such an unforeseeable judicial enlargement, applied retroactively, operated "precisely" like an *ex post facto* law, which the Constitution forbids. *Id* at 353-4.

Again, the parallel between *Zapata* and *Bouie* could not be more direct. Art. 5069-7.07(4) is not vague or overbroad on its face. Rather, it is "narrow and precise," thus giving the drafter "no reason ever to suspect that conduct clearly outside the scope of the statute as written will be retro-

actively brought within it by an act of judicial construction."[20] *Id.*

The *Bouie* Court concluded its discussion of void-for-vagueness principles by characterizing the due process issue as the same as that involved when a state court "overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing," thus denying him his due process right to be heard. The *Bouie* Court noted that the same "standards of state decisional consistency" are applicable in determining "whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of fair warning to which the Constitution entitles him." In both situations, the Court noted that:

> "'. . . a federal right turns upon the status of state law as of a given moment in the past — or, more exactly, the appearance to the individual of the status of state law as of that moment. . . .'" [Citation omitted.]

*Id.* at 354.

Again, *Bouie* is directly on point with *Zapata*. Here, Art. 5069-7.07(4) has been expanded, not only by resort to an antiquated legal fiction, but by a fiction that has been expressly repudiated in every case to reach the Texas Supreme Court in recent years.

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[20] The Act is narrow and precise as it relates only to waivers of claims for conduct during the course of a repossession and not to waivers of claims for conduct subsequent to a repossession. The statutory reference to "any illegal act," however, is far from narrow and precise. To the contract draftsman this clearly would prohibit a waiver of claims for assault and battery, breaking and entering, breach of the peace, etc. during a repossession. It is not clear, however, that such provision would apply to waivers of property rights or grants of licenses just because conduct taken pursuant to such a waiver of property right or grant of a license would be "illegal" in the absence of such a waiver or grant."

The significance of *Bouie* does not end with its discussion of the principles to be applied in testing "void-for-vagueness." The Court's application of those principles to the facts in *Bouie* is also informative in five respects.

First, neither the defendants in *Bouie* nor Appellants here have violated the pertinent statute as it was written. The trespass statute in *Bouie* expressly prohibited only the act of entering premises *in* the face of notice not to do so. There was "nothing in the statute to indicate that it also prohibited the different act of remaining on the premises *after* being asked to leave." 378 U.S. at 355. In *Zapata*, the pertinent language of Art. 5069-7.07(4) prohibits only contractual waivers concerning illegal acts "committed in" a repossession. There is "nothing in the statute to indicate that it also prohibited the different act" of having contractual waivers concerning acts committed after a repossession.

Second, in both cases the prior case law gave no warning that the statute at issue would be expanded beyond its literal terms. In *Bouie*, 95 years of South Carolina cases construing the trespass statute at issue "uniformly emphasized the notice-before-entry requirement, and gave not the slightest indication that that requirement could be satisfied by proof of the different act of remaining on the land after being told to leave." 378 U.S. at 356-57. Similarly, no prior Texas case has intimated that the prohibition against in-repossession waivers can be applied to post-repossession waivers, or that the outworn fiction of *trespass ab initio* can be applied in construing the Consumer Credit Code. Indeed, Texas case law shows that the fiction is dead for any purpose.

The *Bouie* Court also distinguished several civil trespass cases which had been cited for the proposition that one may be liable for damages if one remains on premises after an order to leave, stating that :

> "It is one thing to say that a person remaining on another's land after being told to leave may be ejected with reasonable force or sued in a civil action, and quite another to say he may be convicted and punished as a criminal."

378 U.S. at 358. The *Bouie* Court noted the distinction between civil and criminal trespass and held that the civil doctrine was not only unrelated to the "particular statute" at issue, but to the entire field of punishment by resort to penal statutes. Therefore, such pre-existing civil law gave petitioners no warning that the trespass statute would be construed, despite its clear language to the contrary, as incorporating a doctrine found only in civil law. *Id.* at 359.

Analogously, *trespass ab initio* was a purely civil concept used to characterize a defendant's behavior when an actual trespass had occurred and compensation was sought for damages. In *Zapata*, however, that concept was applied to construe a penal statute which imposes punishment completely divorced from any showing of real, threatened, or even perceived harm. The fiction of *trespass ab initio*, like the civil trespass cases in *Bouie*, is unrelated to the statute at issue, and indeed to the field of punishment by resort to penal statutes.[21]

Third, in both *Bouie* and *Zapata* the case law of other jurisdictions also gave no warning of the judicial construction at issue. In *Bouie*, the Court concluded that:

> "The South Carolina Supreme Court's retroactive application of such a construction here is no less inconsistent with the law of other States than it is with the prior case law of South Carolina and, of course, with the language of the statute itself." 378 U.S. at 361.

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[21] Incredibly, the *Bouie* decision even referred to the *trespass ab initio* as an example of how civil law concepts which are used to adjust the rights of parties where a tort has occurred are not carried over into the administration of penal statutes. *Id.* at 358

Similarly, the overwhelming weight of case law outside Texas has rejected *trespass ab initio.*

Fourth, in both *Bouie* and *Zapata* the pertinent state legislature had confirmed the error of the state court decision at issue. Shortly after the alleged trespass violation in *Bouie,* and prior to the State Supreme Courts's expansion of the trespass statute, the South Carolina Legislature enacted a new trespass statute making it a criminal trespass to fail to leave premises after being ordered to do so. This Court concluded from that fact that it was obvious that the South Carolina Legislature did not believe that its original trespass statute covered such post-entry warnings, and did not anticipate the State Supreme Court's later expansion of the old law. 378 U.S. at 361-62.

In this case, the 1979 Texas Legislature adopted a statute (Art. 5069-7.07(7)) which governs the post-repossession dispositions of property taken during a repossession.[22] In so acting, the Legislature left Art. 5069-7.07(4)

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[22] Art. 5069-7.07(7) provides as follows:

> No retail installment contract or retail charge agreement shall:
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> (7) Contain an authorization for the seller or holder or any person acting on the seller's or holder's behalf to retain or dispose of other tangible personal property that is not subject to a security interest and that is acquired in the repossession of a motor vehicle, except property attached to the vehicle unless the contract or a separate writing requires the seller or holder to send written notice of such an acquisition to the last known address of the buyer as shown by the records of the holder within fifteen days of the discovery of the personal property by the seller or holder. Such notice shall disclose to the buyer:
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> (a) that the buyer may identify and claim the property at a reasonable time before the end of the thirtieth day after the day on which the notice was mailed or delivered; and
>
> (b) the location at which and reasonable times at which the buyer may identify and claim the property during that period.

undisturbed. The Texas Legislature apparently believed that Section 7.07(4) did not cover post-repossession waivers.

The *Bouie* Court drew a further conclusion from the South Carolina Legislature's new trespass law, when it noted that:

> "We think it clear that the South Carolina Supreme Court, in applying its new construction of the statute to affirm these convictions, has deprived petitioners of rights guaranteed to them by the Due Process Clause. If South Carolina had applied to this case its new statute prohibiting the act of remaining on the premises of another after being asked to leave, the constitutional proscription of *ex post facto* laws would clearly invalidate the convictions. The Due Process Clause compels the same result here, where the State has sought to achieve precisely the same effect by judicial construction of the statute. While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal. Application of this rule is particularly compelling where, as here, the petitioners' conduct cannot be deemed improper or immoral. Compare *McBoyle* v. *United States,* 283 U.S. 25." 378 U.S. at 362.

Similarly, if the personalty provision at issue were tested under the new Section 7.07(7), a violation would be found and the Credit Code penalties could be imposed. Any such violation, however, would be invalid under the

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Footnote [22] continued:

> If a contract contains an authorization complying with this Section and such property is not claimed within the thirty days after the notice is mailed or delivered, the seller or holder may retain such property subject to any legal rights of buyer or dispose of such property in a reasonable manner and distribute any proceeds of such disposition according to applicable law.

constitutional prohibition on *ex post facto* laws. Yet, the same prohibited result has been achieved by judicial construction in *Zapata*.

Finally, the *Bouie* opinion stated that "in the last analysis" the cast was controlled by the principle which Chief Justice John Marshall stated in *U.S.* v. *Wiltberger*, 18 U.S. (5 Wheat.) 59, 596 (1820):

> "The case must be a strong one indeed, which would justify a Court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. *It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated. . . .*" (emphasis added)

The *Bouie* decision concluded with a holding that the crime for which the petitioners stood convicted was "not enumerated in the statute" at the time of their conviction. They had therefore been deprived of due process of law. *Id.* at 363.

Appellants submit that a like conclusion must be reached here. The "crime" for which they stand convicted was "not enumerated in the statute" at the time the contract was drafted. They have therefore been deprived of property without due process of law.

## III.

## THE TEXAS SUPREME COURT'S DECISION IN *ZAPATA* THROW OPEN TO ATTACK TENS OF THOUSANDS OF RETAIL INSTALLMENT CONTRACTS

The Texas Supreme Court's decision in *Zapata* not only reimposes the statutory penalties in this particular transaction, but also threatens to subject tens of thousands of other retail installment contracts to the severe Credit Code penalties. To begin with, all contracts used in Texas by Ford Credit that contain the personalty provision at issue are now placed in jeopardy. As noted above, the heavy penalties of the Consumer Credit Code may be imposed in *each* individual installment transaction, without regard to the existence of any real harm.

The impact of the state Supreme Court's treatment of the Credit Code may also may extend far beyond even the many Ford Credit contracts which are directly threatened. In effect, the State Court has held that the express standards of a penal statue may be disregarded whenever a Court confronts a contract provision which is dislikes. The dangers of such subjective application of the law was recognized by this Court in *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972) where the Court stated that:

> ". . . if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

Under a system which allows a finding of violation on a subjective basis without regard to the statute itself, contract drafters will be subject to punishment at the pleasure of a judge for failure to meet his retroactively formed expectations. In that situation, Art. 5069-7.07(4), as applied, would be precisely that type of statute which the United States Supreme Court condemned in *Smith* v. *Goguen,* 415 U.S. 566 (1974):

> "[T]o attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." (at p. 573, fn. 9)

In analogous contexts, this Court has refused to allow the federal Truth-in-Lending Act to be converted into such a windfall mechanism. Instead, this Court has insisted on a careful analysis of the plain words of the statute and of the Legislature's intent. *See e.g., Anderson Brothers Ford* v. *Valencia,* 49 U.S.L.W. 4635 (U.S. June 8, 1981). The Texas Supreme Court has rejected such a reasoned approach, and in so doing has violated Appellants' constitutional rights.

## CONCLUSION

The decision of the Texas Supreme Court in *Zapata* expands th ach of the Texas Consumer Credit without fair notice or warning of its novel application, and thus renders that statute unconstitutional as applied. That decision threatens tens of thousands of Texas contracts drafted with no reasonable expectation that, because of an obsolete legal fiction, a penal statute was being violated. This Court should therefore intervene to protect Appellants' constitutional rights.

Respectfully submitted,

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RANDALL A. HOPKINS
*Counsel of Record for Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Jurisdictional Statement have been sent to all parties required to be served herein, including James G. Boyle, 609 Stewart Title Building, 812 San Antonio Street, Austin, Tex 78701, and the Attorney General of the State of Texas, Courts Building, Post Office Box 12548, Capitol Station, Austin, Texas 78711. Said copies were sent by certified mail, return receipt requested, on this ..... day of August, 1981.

.....

RANDALL A. HOPKINS

reverse the judgment of the court of civil appeals. Rule 483, Texas Rules of Civil Procedure. The court of civil appeals did not consider Hughes Tool Company's other points of error. They included several factual sufficiency points over which this Court has no jurisdiction. Accordingly, we remand the cause to the court of civil appeals for proceedings consistent with this opinion.

**Arnulfo ZAPATA, Petitioner,**

**v.**

**FORD MOTOR CREDIT COMPANY et al., Respondents.**

**No. B-9889.**

Supreme Court of Texas.

May 6, 1981.

Rehearing Denied June 3, 1981.

Truck dealer and finance company appealed from a judgment of the District Court, Travis County, James F. Dear, Jr., J., rendered in favor of truck purchaser in a suit under the consumer credit code. The Court of Civil Appeals, 605 S.W.2d 362, reversed and rendered judgment that truck purchaser take nothing, and he appealed. The Supreme Court, McGee, J., held that: (1) waiver in installment sales contract operated to waive buyer's right of action for the wrongful detention of unsecured personalty taken in the repossession of motor vehicle, and therefore violated section of the credit code prohibiting insertion of such a waiver in a retail installment contract, and (2) fact that language of waiver stated that a buyer merely waived his "claim" to personalty in or attached to repossessed property unless seller received written notice within 24 hours, and that in the absence of such notice, buyer was "deemed" to have waived his claim, did not prevent the waiver from constituting a violation of the credit code.

Judgment of the Court of Civil Appeals reversed, and judgment of the trial court affirmed.

**1. Trespass ⇐8**

A detention of personalty lawfully obtained, after demand, is a wrongful act constituting a trespass.

**2. Trespass ⇐47**

Commission of a trespass does not necessarily mean the actor will be liable for damages; liability does not attach unless the wrongful detention is accompanied by actual damage to the property or deprives the owner of its use for a substantial period of time.

**3. Trover and Conversion ⇐44**

If a wrongful detention of personalty lawfully obtained, after demand, seriously interferes with the owner's right to control the personalty, there is not only a trespass but a conversion which justifies an action to require the actor to pay the full value of the personalty.

**4. Secured Transactions ⇐242**

Trespass and conversion are torts designed to protect against interferences with one's possessory interest in personalty, and are therefore "illegal acts" within the meaning of the section of the credit code providing that no retail installment contract or retail charge agreement shall provide for a waiver of the buyer's rights of action against the seller or holder for any illegal act committed in the repossession of a motor vehicle. Vernon's Ann.Civ.St. arts. 5069-1.01 et seq., 5069-7.07(4).

**5. Secured Transactions ⇐242**

Waiver in installment sales contract, which provided that buyer waived any claim with respect to personalty in or attached to the property when repossessed, unless written demand by certified mail was made upon seller within 24 hours after repossession, operated to waive buyer's

right of action for the wrongful detention of unsecured personalty taken in the repossession of a motor vehicle, and therefore violated section of the credit code prohibiting insertion of such a waiver in a retail installment contract, despite fact that the wrongful detention would not have occurred until at least 24 hours "after repossession" and not "in the repossession" as stated in the applicable section. Vernon's Ann.Civ.St. arts. 5069–1.01 et seq., 5069–7.07(4).

**6. Trespass ⇐8**

A wrongful detention of unsecured personalty 24 hours after repossession, by one in lawful possession, is a trespass from the time of repossession under the doctrine of trespass ab initio, which is followed in the state. Vernon's Ann.Civ.St. arts. 5069–1.01 et seq., 5069–7.07(4).

**7. Secured Transactions ⇐242**

Fact that language of waiver asserted in installment sales contract stated that buyer merely waived his "claim" to personalty in or attached to repossessed property unless seller received written notice within 24 hours, and that in the absence of such notice, buyer was "deemed" to have waived his claim, did not prevent the waiver from constituting a violation of section of the credit code prohibiting insertion of a waiver in a retail installment contract providing for a waiver of the buyer's rights of action against the seller or holder for any illegal act committed in the repossession of a motor vehicle. Vernon's Ann.Civ.St. arts. 5069–1.01 et seq., 5069–7.07(4).

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Boyle & Grigson, James G. Boyle, Austin, for petitioner.

Baker & Botts, Randall A. Hopkins, Houston, Perkins, Oden, Warburton, McNeill & Adami, J. G. Adami, Alice, for respondents.

McGEE, Justice.

Arnulfo R. Zapata sued Yates Ford, Inc. and Ford Motor Credit Company (FMCC) for statutory penalties, alleging that certain provisions in a retail installment contract violate the Texas Consumer Credit Code.[1] The trial court granted Zapata's motion for partial summary judgment and, after a nonjury trial on the issue of attorney's fees, rendered final judgment against Yates Ford and Ford Motor Credit Company. The court of civil appeals reversed the judgment of the trial court and rendered judgment that Zapata take nothing. 605 S.W.2d 362 (Tex.Civ.App.1980). We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

On July 15, 1976, Zapata purchased a new pickup truck from Yates Ford in Austin, Texas. He financed the purchase by executing a retail installment contract which was later assigned to FMCC. The contract was on a preprinted form prepared and supplied by FMCC. Twenty-six months later, in September 1978, Zapata sued to recover a $2,000 statutory penalty and reasonable attorney's fees under section 8.01(b) for violations of the Credit Code.[2] When suit was filed, Yates Ford and FMCC had not repossessed or attempted to repossess the truck; Zapata was current in his obligations under the contract, and Zapata claimed no actual damages. The recovery sought by Zapata is purely penal in nature.

1. Title 79 (Article 5069, Tex.Rev.Civ.Stat.Ann.) is not a code which has been promulgated pursuant to this State's continuing statutory revision program. However, for convenience and clarity we will refer to Article 5069 throughout this opinion as the "Credit Code" or "Code." All statutory references are to sections under Article 5069, unless otherwise noted. All emphases are ours.

2. Section 8.01(b) provides:
"(b) Any person who violates this Subtitle or Chapter 14 of this Title by (i) failing to perform any duty or requirement specifically imposed on him by any provision of this Subtitle or Chapter 14 of this Title, or by (ii) committing any act or practice prohibited by this Subtitle or Chapter 14 of this Title, shall be liable to the obligor for a penalty in an amount equal to twice the time price differential or interest contracted for, charged, or received but not to exceed $2,000 in a transaction in which the amount financed is $5,000 or less, . . ."

Zapata moved for a partial summary judgment. He alleged the retail installment contract contained seven violations of the Credit Code.[3] The trial court granted the motion and assessed a $2,000 penalty against Yates Ford and FMCC but did not say on which violation it based its ruling. After a trial on the issue of attorney's fees, the trial court rendered final judgment against Yates Ford and FMCC, jointly and severally, for a $2,000 penalty and $5,000 in attorney's fees. The court of civil appeals reversed the judgment and rendered judgment that Zapata take nothing. The court of civil appeals ruled against Zapata on each alleged violation.

We granted Zapata's application for writ of error on two points of error. In the first point, Zapata contends the waiver clause in paragraph nineteen (19) of the retail installment contract violates section 7.07(4) of the Code. This section prohibits waiver of buyer's rights of action against a seller in installment contracts for illegal acts committed in the repossession of a motor vehicle. In the second point, he argues the retail installment contract fails to "clearly and conspicuously" disclose that physical damage insurance is required in violation of section 7.06(3) of the Code. We hold the waiver clause violates section 7.07(4). Thus, we find it unnecessary to discuss Zapata's point concerning a violation of section 7.06(3) because a single violation of the Code will trigger the penalties under section 8.01.

The waiver clause is found in paragraph nineteen (19) on the back of the contract. It provides:

"Any personalty in or attached to the property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."

Zapata contends the second part of the waiver clause, which provides "... Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession," violates section 7.07(4) of the Code. He relies on *Southwestern Investment Company v. Mannix*, 557 S.W.2d 755 (Tex.1977), and *Ford Motor Credit Company v. Cole*, 503 S.W.2d 853 (Tex.Civ.App.—Forth Worth 1973, writ dism'd).

Section 7.07(4) provides:

"No retail installment contract or retail charge agreement shall:

"(4) *Provide for a waiver of the buyer's rights of action against the seller or holder* or other person acting therefor *for any illegal act committed* in the collection of payments under the contract or agreement or *in the repossession of a motor vehicle*; ..."

In *Southwestern Investment Company v. Mannix, supra*, the question was whether a provision in a retail installment contract of goods violated section 6.05(4) of the Code. The statutory language in section 6.05(4) is identical to the statutory language in section 7.07(4). However, section 6.05(4) applies to retail installment sales of goods generally and section 7.07(4) applies exclusively to motor vehicle installment sales. The contract provision in *Mannix* provided:

3. Zapata alleged the retail installment contract violated the Credit Code in the following respects: (1) failure to clearly and conspicuously disclose the amount charged for the mechanical breakdown insurance in violation of Article 5069-7.06(8); (2) overcharge of the license, title and registration fees which is unauthorized by Article 5069-7.01(f); (3) false labeling of required insurance as optional insurance in violation of Article 5069-7.06(3); (4) failure to properly identify Ford Motor Credit Company as a creditor in violation of Art. 5069-14.11(a); (5) improperly reserving a security interest in unearned premiums on the reverse side of the contract in violation of Art. 5069-14.17(a)(1); (6) including the overcharge of the license, title and inspection fee charged in the Amount Financed thereby charging an undisclosed finance charge in violation of Article 5069-14.04; (7) waiver of the act of illegally converting personalty committed in connection with repossession of the collateral, in violation of Article 5069-7.07(4).

"Nothing shall prevent the Secured Party from removing [the property] from any premises to which same may be attached, upon default or breach of this Retail Installment Contract and Security Agreement or any part thereof, and the Debtor agrees to sustain the cost of repairs, if any, of any physical injury to the real estate caused by such removal."

In *Mannix*, we held this provision violated section 6.05(4) because it waived a buyer's right of action for a tort committed in the repossession of goods. We explained the Legislature intended for such unconscionable contract provisions to be unenforceable and to penalize creditors for including these provisions in installment contracts.

In *Ford Motor Credit Company v. Cole*, *supra*, the same waiver clause was before the Fort Worth Court of Civil Appeals. That was a venue case where the court stated it would not be permissible to construe the waiver clause to exempt Ford Motor Credit Company from liability should it convert or deprive the buyer of use of unsecured property. This construction of the clause, the court concluded, would be unenforceable as contrary to the public policy of this State.

[1, 2] The parties concede the first part of the waiver clause, which provides "[a]ny personalty in or attached to the property when repossessed may be held by Seller without liability . . .," merely restates the bailor-bailee relationship existing at common law with respect to personalty in a repossessed vehicle. However, a person in lawful possession of personalty may still be guilty of trespass or conversion for its unlawful detention. A detention of personalty lawfully obtained, after demand, is a wrongful act constituting a trespass. *Brite v. Pfeil*, 334 S.W.2d 596 (Tex.Civ.App.—San Antonio 1960, no writ); *see Mountain States Tel. & Tel. Co. v. Vowell Construction Co.*, 161 Tex. 432, 341 S.W.2d 148 (1960). The commission of a trespass does not necessarily mean the actor will be liable for damages. Restatement (Second) of Torts § 217, Comment a (1965). Liability does not attach, unless the wrongful detention is accompanied by actual damage to the property or deprives the owner of its use for a substantial period of time. *See Lyle v. Waddle*, 144 Tex. 90, 188 S.W.2d 770 (1945); Restatement (Second) of Torts § 218 (1965). Even in the absence of damages, a trespass has occurred which is important in determining the legal relations between the parties.[4]

[3, 4] If the wrongful detention seriously interferes with the owner's right to control the personalty, there is not only a trespass but a conversion which justifies an action to require the actor to pay the full value of the personalty. *Smith v. Texas & N. O. Ry. Co.*, 101 Tex. 405, 108 S.W. 819 (1908); *Norris v. Bovina Feeders, Inc.*, 492 F.2d 502 (5th Cir. 1974). Section 237 of the Restatement of Torts (Second) reads: "One in possession of a chattel as bailee or otherwise who, on demand, refuses without proper qualification to surrender it to another entitled to its immediate possession, is subject to liability for conversion." Trespass and conversion are torts designed to protect against interferences with one's possessory interest in personalty. They are "illegal acts" within the meaning of section 7.07(4) of the Credit Code. *See Southwestern Investment Company v. Mannix*, *supra*.

[5, 6] The waiver clause in this case waives a buyer's right of action for the wrongful detention of unsecured personalty taken in the repossession of a motor vehicle. If the buyer fails to demand his property within 24 hours after repossession, all

4. Comment a to § 217 of the Restatement (Second) of Torts states in part:

"A trespass, though not actionable . . . , may nevertheless be important in the determination of the legal relations of the parties. Thus, the fact that one person is committing a trespass to another's chattel, while it may not be actionable because it does no harm to the chattel or to any other legally protected interest of the possessor, affords the possessor a privilege to use force to defend his interest in its exclusive possession . . . . So too, the fact that one person is a trespasser is important in determining the duty of care owing to him by the possessor of the chattel. . . ."

claims for its subsequent wrongful detention are waived. The fact the wrongful detention waived does not occur until at least 24 hours "after repossession" and not "in the repossession" as stated in section 7.07(4) is immaterial because the doctrine of trespass ab initio is followed in Texas. *See Humphreys Oil Co. v. Lile*, 262 S.W. 1058 (Tex.Civ.App.—Waco 1924), *aff'd*, 277 S.W. 100 (Tex.Comm'n App. 1925, judgment adopted); *Brite v. Pfeil, supra, American Mortgage Corp. v. Wyman*, 41 S.W.2d 270 (Tex.Civ.App.—Austin 1931, no writ); and *Lyles v. Meyer*, 293 S.W. 295 (Tex.Civ.App. —San Antonio 1927, writ ref'd). Under this doctrine, a wrongful detention of unsecured personalty 24 hours after repossession, by one in lawful possession, is a trespass from the time of repossession. *Id.* This waiver clause is not only contrary to public policy, *see Ford Motor Credit Company v. Cole, supra*, but it is also prohibited by section 7.07(4) of the Credit Code.

[7] Yates Ford and FMCC argue that the waiver clause does not waive a buyer's "right of action" but merely his claim to the personalty in the repossessed vehicle. They also urge the word "deemed" in the waiver clause only amounts to a rebuttable presumption of a waiver and not a conclusive presumption. The use of the word "deemed" and "claim" does not save a contract clause which otherwise violates section 7.07(4). The construction placed upon this contract language by Yates Ford and FMCC is contrary to the express legislative intent in enacting the Credit Code.

We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

**IRANIAN MUSLIM ORGANIZATION et al., Petitioners,**

**v.**

**CITY OF SAN ANTONIO et al., Respondents.**

**No. B-9850.**

Supreme Court of Texas.

**May 13, 1981.**

Group of Iranians sought temporary mandatory injunction requiring the City of San Antonio to issue parade permits to permit them to demonstrate against the presence at a nearby military base of the former Shah. The 57th District Court, Bexar County, Peter Michael Curry, J., denied relief and the Iranians appealed. The San Antonio Court of Civil Appeals, Fourth Supreme Judicial District, 604 S.W.2d 379, affirmed, and the Iranians appealed. The Supreme Court, Spears, J., held that: (1) action of city by moving to deny all who would exercise their First Amendment rights of speech and assembly on subject of Shah's presence was content-based and slipped from neutrality of regulation of time, place and circumstance into impermissible concern about content; (2) potential danger feared by city officials regarding public disorder which might have resulted from demonstration was not constitutionally permissible factor to be considered in granting or denying parade permit; (3) fact that parade ordinance was not introduced into evidence was of no consequence in light of overwhelming evidence in record that sole basis for denial of permit was views sought be expressed by the Iranians; (4) city failed to meet its "heavy burden" to justify imposition of prior restraint on exercise of free speech; and (5) controversy was not moot in light of irreparable injury which had occurred, notwithstanding that date and condition for which permit was requested no longer existed.

Reversed and remanded.

Barrow, J., dissented and filed opinion in which Greenhill, C. J., and McGee and Denton, JJ., joined.

# APPENDIX B



APPENDIX—Continued

tion of Walnut Creek, the determinations by the City of Austin and the U.S. Corps of Engineers concerning the location of the 25-year and 100-year flood plains in relation to the Las Cimas and Crystalbrook subdivisions, and any delays, alleged misrepresentations by Austin Savings, or any problems attributable to such flood plain determination and channelization of Walnut Creek, except as specifically reserved below. It is specifically agreed and understood, however, that such release shall not relate to any claim or cause of action arising out of the above described circumstances that might be brought by any third party against Bryan Adams, in which event Bryan Adams reserves the right to pursue a cross-action against Austin Savings, but only to the extent that Bryan Adams should be held liable to such third party.* Nothing herein shall be construed as any admission by Austin Savings of liability for any of the alleged claims described above, and Austin Savings hereby expressly denies any such liability. Under no circumstances should this agreement be construed as an assumption of liability by Austin Savings of any claims or causes of action by third parties against Bryan Adams."

"* If any claim is brought against Bryan Adams for any claim involving the above referenced flood plain problems by any party who purchased a lot from Bryan Adams, Austin Savings agrees to assume the responsibility for the defense of any such lawsuit."

**FORD MOTOR CREDIT COMPANY et al., Appellants,**

**v.**

**Arnulfo ZAPATA, Appellee.**

**No. 8481.**

Court of Civil Appeals of Texas, Beaumont.

Aug. 14, 1980.

Rehearing Denied Sept. 25, 1980.

Truck dealer and finance company appealed from a judgment of the District Court, Travis County, James F. Dear, Jr., J., rendered in favor of truck purchaser in a suit brought under the consumer credit code. The Court of Civil Appeals, Keith, J., held that: (1) repeal of a chapter of the code by the legislature without a savings clause destroyed purchaser's cause of action for penalties under such chapter; (2) paragraph of the contract relating to repossession did not violate section of the code forbidding waiver of buyer's right for any illegal act committed in the collection of payment or repossession of a motor vehicle, in that the assumption was required that any repossession would not be done in such manner as to constitute an intentional tort or breach of the peace; and (3) the contract clearly and conspicuously disclosed the requirement of physical damage insurance in compliance with the code.

Reversed and rendered.

**1. Consumer Credit ⇐2**

Repeal by legislature of chapter of consumer credit code without a savings clause destroyed plaintiff's cause of action for penalties against truck dealer and finance company under such chapter where final relief to plaintiff had not been granted when repeal went into effect. Vernon's Ann. Civ.St. arts. 5069-14.01 to 5069-14.28 (Repealed).

**2. Consumer Credit ⇐2**

Plaintiff could not recover under section of consumer credit code for failure of truck finance contract to clearly and conspicuously disclose the amounts charged for mechanical breakdown insurance where contract was executed at a time when statute had no requirements relating to mechanical breakdown insurance. Vernon's Ann.Civ.St. art. 5069-7.06(8, 9).

**3. Consumer Credit ⇐3**

Paragraph of truck finance contract relating to repossession did not violate section of consumer credit code forbidding waiver of buyer's right of action against seller or holder for any "illegal act" committed in collection of payment or repossession of motor vehicles, in that assumption was required that any repossession would not be

done in such manner as to constitute an intentional tort or breach of the peace. Vernon's Ann.Civ.St. art. 5069–7.07(4).

**4. Consumer Credit ⇐15**

Truck finance contract clearly and conspicuously disclosed requirement of physical damage insurance in compliance with the consumer credit code. Vernon's Ann.Civ.St. art. 5069–7.06(3).

**5. Consumer Credit ⇐2**

In action by purchaser of truck against dealer and finance company under consumer credit code, purchaser could not recover under code for alleged collection of $7.11 claimed to have been an overcharge of license or registration fee, in that if such amount was not de minimis non curat lex, it could only have been recovered by reliance upon section of code which had been repealed. Vernon's Ann.Civ St. art. 5069–7.01(f); art. 5069–14.04 (Repealed).

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F. Walter Conrad, Jr., Houston, Mary Joe Carroll, Austin, J. G. Adami, Jr., Alice, for appellants.

James G. Boyle, Austin, for appellee.

KEITH, Justice.

Defendants below appeal from an adverse judgment rendered in a suit brought under the Texas Consumer Credit Code, Chapters 7 and 14.[1] Plaintiff's motion for partial summary judgment was granted and damages of $2,000 were assessed against the defendants under the provisions of *§ 8.01(b)* of the Code. The Court, after a bench trial, awarded plaintiff $5,000 in attorney's fees and merged the partial summary judgment into a final judgment from which this appeal has been perfected.

The judgment is joint and several against the two defendants but neither seeks indemnity nor contribution from the other and separate briefs have been filed by each defendant.

In July 1976, plaintiff purchased a new pickup truck from the defendant Yates Ford, Inc., financing the purchase by executing a retail installment contract which was assigned to Ford Motor Credit Company a few days later. More than two years later, in September of 1978, plaintiff sued the seller and the finance company asserting that the contract which he signed did not comply with several provisions of the Code. At the time he sued, he was current in his obligations under the contract and he made no effort to show any actual damages had been sustained. The defendants did not file cross-action against plaintiff.

His motion for summary judgment mirrored the allegations of his third amended petition wherein he sought relief because of alleged violations of several sections of the Code as noted in the margin.[2] The motion was sustained generally and we have no indication that one or more of the grounds set out in the motion for summary judgment was not sustained.

A single violation of the Code is sufficient to trigger the penalty under *§ 8.01(b)*. *Chapman v. Miller*, 575 S.W.2d 581, 583 (Tex.Civ.App.–Beaumont 1978, writ ref'd n. r. e.). Thus, defendants labor under the burden of establishing that the trial court erred as to each of the seven alleged violations. Conversely, if one violation is shown to have been established as a matter of law by the summary judgment proof, the judgment must be affirmed as the other alleged violations become immaterial.

[1] In order to narrow the question even more, we first address defendants' contentions that the repeal of Chapter 14 of the Code by the Legislature in 1979, *without a savings clause*, destroyed plaintiff's cause of action for penalties under such chapter. The effective date of the repeal was August

1. *Tex.Rev.Civ.Stat.Ann. arts. 5069–7.01 through 5069–7.10 and 5069–14.01 through 5069–14.28 (1971–1979 Pamp.Supp.)*. Chapter 14 was repealed by Acts 1979, 66th Leg., p. 1595, ch. 672, § 51, effective August 27, 1979. All subsequent references to the Consumer Credit Code shall be to the sections thereof unless otherwise indicated.

2. Plaintiff sought relief under the following sections of the Code: *§§ 7.01(f), 7.06(3), 7.06(8), 7.07(4), 14.04, 14.11(a), and 14.17(a)(10)*.

27, 1979. Acts 1979, 66th Leg., p. 1595, ch. 672, § 51. The judgment was signed on July 10, 1979.

The sole base for plaintiff's recovery is the statute, no common law cause of action having been asserted, and he has made no effort to show any actual damages were sustained. Thus, the language used by the Court in *Dickson v. Navarro County Levee Imp. Dist. No. 3*, 135 Tex. 95, 139 S.W.2d 257, 259 (1940), is appropriate:

> "It is almost universally recognized that if a statute giving a special remedy is repealed, without a saving clause in favor of pending suits, all suits must stop where the repeal finds them; and, if final relief has not been granted before the repeal goes into effect, it cannot be granted thereafter. A like general rule is that if a right to recover depends entirely upon a statute, its repeal deprives the court of jurisdiction over the subject matter."

The rule so announced is still viable. See *Harris County v. Suburban Utility Co.*, 547 S.W.2d 72, 74 (Tex.Civ.App.–Houston [1st Dist.] 1977, no writ).

In considering the question before us, the opinion of the Supreme Court, quoting from recognized text and authoritative decisions in *National Carloading Corp. v. Phoenix–El Paso Express*, 142 Tex. 141, 176 S.W.2d 564, 569 (1943), is dispositive. After holding that the courts are agreed that rights based upon purely statutory grounds may be abolished " 'even after they have accrued' ", the Court continued:

> " 'The courts have been particularly uniform in reaching this conclusion where the right of action is in the nature of a claim by an individual for the recovery of a statutory fine, penalty, or forfeiture.' "

Even more to the point in this case is further language used in *National Carloading Corp.*:

> "If, before rights become vested in particular individuals, the convenience of the State induces amendment or repeal of the laws upon which they are based, these individuals are left without any remedy at law to enforce their claims; *and if final relief has not been granted before the repeal goes into effect it cannot be granted thereafter, even if a judgment has been entered and the cause is pending upon appeal.*" (176 S.W.2d at 570, emphasis supplied)

Plaintiff argues that since Chapter 14 is mentioned in several places in the unrepealed portions of the Code, the "repealer" should be given effect only prospectively. We have given consideration to the argument but remain unpersuaded. If the Legislature cared to protect rights which had accrued under the provisions of Chapter 14, "it would have been a simple matter to have so stated." *First State Bank of Bedford v. Miller*, 563 S.W.2d 572, 577 (Tex. 1978). Legislative oversight cannot be used to breathe life into a dead statute.

Making application of the rules set forth in *Dickson* and *National Carloading*, supra, we are of the opinion that plaintiff's recovery may not be sustained upon any claim resting upon an alleged violation of the provisions of Chapter 14 of the Code. Consequently, we sustain point sixteen in the brief of each defendant.[3]

Under our holding with reference to Chapter 14, plaintiff's summary judgment may not be supported by the implied holdings of the trial court in sustaining grounds four, five, and six of plaintiff's supplemental motion for summary judgment. The points of error of the defendants challenging the summary judgment, insofar as such judgment rests upon violations of Chapter 14, are sustained.

[2] Plaintiff's first complaint was that the contract violated *§ 7.06(8)* by failing clearly and conspicuously to disclose the amount charged for mechanical breakdown insurance. If any recovery is based upon this alleged violation, it must be set aside and we now do so by sustaining point one.

3. "The trial court erred in granting summary judgment for the appellee under Tex.Rev.Civ. Stat.Ann., Art. 5069–14.01 et seq. because the Texas Legislature's repeal of Chapter 14 eliminated the appellee's cause of action and right to recover thereon."

The contract was executed on July 15, 1976, at a time when the statute had no requirements relating to mechanical breakdown insurance. It was not until an act adopted by the 65th Legislature in 1977 became effective was there any language relating to mechanical breakdown insurance.[4]

Plaintiff does not attempt to defend the application of the penalty in an amended statute to a contract executed before the penalty statute was enacted. To do so would contravene not only the *Tex.Const. art. I, § 16*, but also the rule that statutes are ordinarily designed to operate prospectively and not retroactively. See, e. g., *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642, 648–649 (Tex.1971); *State v. Humble Oil & Refining Co.*, 141 Tex. 40, 169 S.W.2d 707, 708–709 (1943).

The statute is one imposing a penalty and must be strictly construed. *Hight v. Jim Bass Ford, Inc.*, 552 S.W.2d 490, 491 (Tex. Civ.App.–Austin 1977, writ ref'd n. r. e.). We sustain defendants' point one and deny plaintiff any recovery under *§ 7.06(8)* as adopted in 1977. Such holding renders moot defendants' second and third points submitted contingently upon our answer to the first point.

[3] One of the grounds relied upon by plaintiff to sustain his recovery is a contention that paragraph nineteen of the contract was in violation of *§ 7.07(4)*.[5] The language which forms the basis of plaintiff's complaint is this:

> "Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."

Plaintiff argues that the quoted language "flies completely in the face" of *Southwestern Investment Co. v. Mannix*, 557 S.W.2d 755, 763 (Tex.1977); and that a federal district judge reached a different conclusion.[6] We have given careful consideration of *Mannix*, since we are required to follow the rationale if it is applicable. No such requirement is imposed upon this court when we consider the federal district court opinion.

*Mannix* is not in point in this case. There, the contract would force the buyer to assume the cost of damage done to his home by a forcible entry or an injury which was the result of intentionally tortious conduct. The Court also noted that a breach of peace during repossession would be in violation of the Business and Commerce Code.

We have no such result possible from the language before us. We must, in the absence of anything to the contrary, assume that the repossession would not be done in such manner as to constitute an intentional tort or a breach of the peace. The identical paragraph was considered and upheld in *Tradewinds Ford Sales, Inc. v. Caskey*, 600 S.W.2d 865 (Tex.Civ.App.–Eastland 1980).

A similar contention was rejected in *Martens v. General Motors Acceptance Corp.*, 584 S.W.2d 941 (Tex.Civ.App.–Dallas 1979, no writ). We follow *Caskey* and *Martens*; and, to the extent that *Gutierrez* may be to the contrary, decline to follow it. We sustain defendants' sixth point of error, thereby eliminating the necessity of considering its alternative seventh point challenging the constitutionality of such statute as applicable to post-repossession activities.

4. Acts 1977, 65th Leg., p. 1355, ch. 536, effective June 15, 1977. This statute is now codified as *§ 7.06(9) (1971–1979 Pamp.Supp.)*.

5. *§ 7.07(4)*: "No retail installment contract or retail charge agreement shall: ... (4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any *illegal act* committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle; ..." (emphasis supplied).

6. We are referred to an unpublished opinion entitled *Gutierrez v. McMorris Downtown Ford, Inc.*, Civil Action No. A-77-CA-174 (W.D.Tex., May 20, 1980), attached to plaintiff's postsubmission reply brief.

[4] In our approach to defendants' eighth point of error,[7] we have given careful consideration to the actual appearance of the photocopy of the contract in question in our attempt to determine if the contract meets the requirement of the statute. After such consideration and a review of the authorities relied upon by the parties, we are of the opinion that as a matter of law the contract "clearly and conspicuously" discloses the requirement of physical damage insurance in compliance with *§ 7.06(3)* of the Act.

The front side of the contract contains a statement in bold type headed "OPTIONAL INSURANCE", less than five inches above plaintiff's signature which plainly notified the buyer:

> "Physical Damage Insurance is required by this contract.... Buyer may choose the person through whom such insurance is to be obtained, and Buyer shall have the option of furnishing the required insurance through existing policies of insurance owned or controlled by him or obtained by him through any insurance company authorized to transact business in Texas."

This language is clear, and the requirement is conspicuous on the face of the contract. But, plaintiff cites *Smith v. Chapman*, 614 F.2d 968, 977-978 (5th Cir. 1980), contending that the holding therein calls for a different conclusion in this case. We have given careful consideration to the cited case but do not find it to be factually analogous to the provision we have in the case at bar. We sustain defendants' point eight and do not reach the subsidiary point nine.

[5] Finally, we come to a consideration of plaintiff's contention that he is entitled to recover because there was a violation of the Code by the collection of $7.11 which he claims to have been an overcharge of the license or registration fee. If this amount is not de minimis non curat lex,[8] it can only be recovered by reliance upon *§ 14.04*, a victim of the 1979 statutory repeal which we discussed earlier. Consequently, plaintiff's recovery may not be upheld by reliance upon *§ 7.01(f)* of the Code.

Having reviewed the record and the voluminous briefs in detail and, being of the opinion that the trial court erred in entering the judgment, we reverse and now render judgment that the plaintiff take nothing as against either of the defendants.

REVERSED and RENDERED.

CLAYTON, J., not participating.

7. Point eight: "The trial court erred in granting judgment for the appellee because, as a matter of law, the contract in question clearly and conspicuously disclosed that physical damage insurance was required."

8. See, e. g., *Anguiano v. Jim Water Homes, Inc.*, 561 S.W.2d 249, 255 (Tex.Civ.App.-San Antonio 1978, writ ref'd n. r. e.); *Thornhill v. Sharpstown Dodge Sales, Inc.*, 546 S.W.2d 151, 153 (Tex.Civ.App.-Beaumont 1976, no writ).

**STATE of Texas et al., Appellants,**

**v.**

**Sam D. MILLSAP, Appellee.**

**No. 8486.**

Court of Civil Appeals of Texas, Beaumont.

Aug. 14, 1980.

Blind operator of full service cafeterias who was serving as member of Commission for the Blind brought declaratory judgment action against state seeking declaration that he was eligible to serve as member of the Commission. The District Court, Travis County, Pete Lowry, J., entered judgment for plaintiff, and defendant appealed. The Court of Civil Appeals, Keith, J., held that: (1) statute governing eligibility for appointment to State Commission for the Blind

## APPENDIX C

IN THE

# 53rd Judicial District Court

OF

TRAVIS COUNTY, TEXAS

No. 279,722

ARNULFO ZAPATA

v.

YATES FORD, INC. and

FORD MOTOR CREDIT COMPANY

## FINAL JUDGMENT

ON THE 10th day of April, 1979, this Court heard Plaintiff's Motion for Partial Summary Judgment and after considering the arguments of counsel and the pleadings, depositions and discovery on file at that time it was the opinion of this Court that such Motion be granted. An Order granting said Motion was entered herein on the 26th day of June, 1979.

As granted in said Order it is the opinion of this Court that Plaintiff be awarded a judgment against Defendants YATES FORD, INC. and FORD MOTOR CREDIT COMPANY jointly and severally in the amount of $2,000.00 plus reasonable attorney's fees.

On the 5th day of July, 1979, came to be heard before this Court a trial on the merits on the issue of reasonable attorney's fees to be awarded Plaintiff. This was the only issue not decided by said Order.

All parties were given reasonable notice of the hearing and Plaintiff and Defendant Ford Motor Credit Company appeared through their counsel and Defendant Yates Ford, Inc. failed to appear herein. After considering the evidence adduced and the arguments of counsel it is the opinion of this Court that Plaintiff recover judgment from Defendants in the sum of $5,000.00 as reasonable attorney's fees, and if this cause is appealed to the Supreme Court and the Application for Writ of Error is denied by the Court, $500.00 is to be credited to the judgment; if no Application for Writ of Error is filed, $1,000.00 is to be credited to the judgment; and if no appeal is made to the Court of Civil Appeals, $1,500.00 is to be credited to the judgment, leaving recovery for attorney's fees herein in the sum of $2,000.00. It is therefore

ORDERED, ADJUDGED AND DECREED that Plaintiff recover against Defendants the sum of $2,000.00, the statutory penalty for violating the Texas Consumer Credit Code; attorney's fees in the sum of $5,000.00 and if this cause is appealed to the Supreme Court and the Application for Writ of Error is denied by the Court, $500.00 is to be credited to the judgment; if no Application for Writ of Error is filed $1,000.00 is to be credited to the judgment; and if no appeal is made to the Court of Civil Appeals, $1,500.00 is to be credited to the judgment, leaving recovery for attorney's fees herein in the sum of $2,000.00; interest at the rate of nine percent (9%) per annum from the date of rendition of judgment until same is paid; and for costs to be taxed against Defendant, for all of which let execution issue.

SIGNED AND ENTERED this the 10 day of July, 1979.

JAMES F. DEAR, JR.
*Judge Presiding*

APPROVED:

JAMES G. BOYLE
609 Stewart Title Bldg.
812 San Antonio St.
Austin, Texas 78701
*Attorney for Plaintiff*

GLEN WILKERSON
CLARK THOMAS WINTERS
& SHAPIRO
12th Floor Capitol National
Bank Bldg.
Austin, Texas 78701
*Attorney for Defendant*

# APPENDIX D

NO. B-9889

IN THE

SUPREME COURT

OF TEXAS

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ARNULFO R. ZAPATA,

Petitioner

V.

FORD MOTOR CREDIT COMPANY
and YATES FORD, INC.,

Respondents

---

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

TO THE HONORABLE SUPREME COURT OF THE STATE OF TEXAS:

Notice is hereby given that Ford Motor Credit Company and Yates Ford, Inc., Respondents herein, hereby appeal to the Supreme Court of the United States from the final judgment of the Texas Supreme Court reversing the judgment of the Court of Civil Appeals and affirming the judgment of the District Court of Travis County that Respondents were liable for a violation of Tex.Rev.Civ.Stat.Ann., Art 5069-7.07(4), for statutory penalties and for attorneys' fees. Said judgment was entered by this Court on May 21, 1981, and Respondents' timely filed Motion for Rehearing was overruled on June 3, 1981.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

Respectfully submitted,

BAKER & BOTTS

By: Randall A. Hopkins

Randall A. Hopkins
TB# 09977300
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3000 One Shell Plaza
Houston, Texas 77002
(713) 229-1234

Attorneys for Respondents Ford Motor Credit Company and Yates Ford Inc.

CERTIFICATE OF SERVICE

I certify that on this 31 day of August, 1981, I deposited in the United States mail, postage prepaid, certified, return receipt requested, a true and correct copy of the above and foregoing Notice of Appeal To the Supreme Court of the United States, properly addressed to:

Mr. James G. Boyle
609 Stewart Title Building
Austin, Texas 78701

Honorable Mark White
Attorney General
Supreme Court Building
Austin, Texas 78711

Randall A. Hopkins

RAH:30:N

# CHAPTER 7

# MOTOR VEHICLE INSTALLMENT SALES

Art.

5069—7.01. Definitions.
5069—7.02. Requirements and prohibitions as to retail installment contracts.
5069—7.03. Finance charge limitations.
5069—7.04. Refunds on prepayment.
5069—7.05. Amendments of retail installment contracts.
5069—7.06. Insurance.
5069—7.07. Prohibited provisions.
5069—7.08. Assignment and negotiation
5069—7.09. Application.
5069—7.10. Waiver.

*Chapter 7, Motor Vehicle Installment Sales, consisting of articles 5069—7.01 to 5069—7.10, was enacted by Acts 1967, 60th Leg., p. 609, ch. 274, § 2, effective January 1, 1968. Provisions relating to cash and time prices in sales of motor vehicles were formerly covered by repealed article 5074a.*

## Art. 5069—7.01. Definitions

For the purposes of this Chapter, unless the context otherwise requires:

(a) "Motor Vehicle" means and is limited to any automobile, mobile home, truck, truck tractor, trailer, semi-trailer and bus designed and used primarily to transport persons or property on a public highway, excepting however, any boat trailer, any vehicle propelled or drawn exclusively by muscular power or which is designed to run only on rails or tracks or in the air, or other machinery not designed primarily for highway transportation, but which may incidentally transport persons or property on a public highway.

(b) "Retail Buyer" or "Buyer" means a person who agrees to buy or buys a motor vehicle other than principally for the purpose of resale, from a retail seller in a retail installment transaction.

(c) "Retail Seller" or "Seller" means a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions.

(d) "Retail Installment Transaction" or "Transaction" means any transaction as a result of which a retail buyer acquires a motor vehicle from a retail seller under a retail installment contract for a sum consisting of the cash sale price and other charges as limited by this Chapter and agrees with a retail seller to pay part or all of such sum in one or more deferred installments. The term shall include every transaction wherein the promise or agreement to pay the deferred balance of such sum is made by the retail buyer to the retail seller notwithstanding the existence or occurrence of any one or more of the following events: (i) that the retail seller has arranged or arranges to sell, transfer or assign the retail buyer's obligation; (ii) that the amount of the charges is determined by reference to charts or information furnished by a financing institution; (iii) that the forms of instruments used to evidence the retail installment transaction are furnished by a financing institution; and (iv) that the credit standing of the retail buyer is or has been evaluated by a financing institution.

(e) "Retail Installment Contract" or "Contract" means a contract entered into in this State evidencing a retail installment transaction. The term includes a chattel mortgage, conditional sale contract, security agreement and a contract in the form of a bailment or a lease if the bailee or lessee contracts to pay as compensation for use a sum substantially equivalent to or in excess of the value of the motor vehicle sold and it is agreed that the bailee or lessee is bound to become, or, for no further or a merely nominal consideration, has the option of becoming, the owner of the motor vehicle upon full compliance with the provisions of the bailment or lease. The term shall also include a contract which the parties have amended in order to renew, restate or reschedule the unpaid balance thereof, or to extend or defer the scheduled due date of all or any part of any installment or installments, in which case the retail installment contract shall consist of the original contract and the amendments thereto.

(f) "Cash Sale Price" means the price stated in a retail installment contract for which the seller would have sold to the buyer and the buyer would have bought from the seller, the motor vehicle which is the subject matter of such contract if such sale had been a sale for cash. The cash sale price may include any taxes, registration, certificate of title and license fees, and charges for delivering, servicing, repairing, altering or improving the motor vehicle.

(g) "Official Fees" means the amount of the fees prescribed by law for filing, recording or otherwise perfecting and, in addition, for releasing or satisfying a retained title, lien or other security interest created in connection with a retail installment transaction.

(h) "Principal Balance" means the cash sale price of the motor vehicle plus the amounts, if any, included in the retail installment con-

tract, if a separate identified charge is stated therein, for insurance and other benefits and official fees, less the amount of the buyer's down payment, if any, in money or goods or both.

(i) "Time Price Differential" means the total amount to be added to the principal balance to determine the balance of the buyer's indebtedness to be paid under a retail installment contract.

(j) "Holder" means the retail seller of the motor vehicle or assignee if the retail installment contract or the outstanding balance thereunder is sold or otherwise transferred.

(k) "Time Sale Price" means the total of the cash sale price of the motor vehicle and the amount, if any, included for insurance, if a separate identified charge is made therefor, and the official fees and the time price differential.

(*l*) "Person" means an individual, partnership, corporation, joint venture, trust, association, or any legal entity however organized.

(m) Words of the masculine gender include the feminine and the neuter, and when the sense so indicates, words of the neuter gender may refer to any gender.

Acts 1967, 60th Leg., p. 648, ch. 274, § 2, eff. Jan. 1, 1968.

## Art. 5069—7.02. Requirements and prohibitions as to retail installment contracts

(1) Each retail installment contract shall be in writing, dated, signed by both the buyer and the seller, and completed as to all essential provisions before it is signed by the buyer; provided, however, if delivery of the motor vehicle is not made at the time of the execution of the contract, the identifying numbers or marks or similar information and the due date of the first installment may be inserted in the contract after its execution. A retail installment contract need not be contained in a single document.

(2) The printed portion of the retail installment contract, other than instructions for completion, shall be in a size equal to at least eight-

point type. Such contract shall contain substantially the following notice in a size equal to at least ten-point bold type:

"NOTICE TO THE BUYER—DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE CONTRACT YOU SIGN. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE TIME PRICE DIFFERENTIAL. KEEP THIS CONTRACT TO PROTECT YOUR LEGAL RIGHTS."

(3) A retail installment contract shall also contain, in a size equal to at least ten-point bold type, a specific statement that liability insurance coverage for bodily injury and property damage caused to others is not included, if that is the case.

(4) The seller shall deliver to the buyer, or mail to him at his address shown on the retail installment contract, a copy of such contract as accepted by the seller. Until the seller does so, a buyer who has not received delivery of the motor vehicle shall have the right to rescind his contract and to receive a refund of all payments made and a return of all goods traded in to the seller on account of or in contemplation of such contract, or if the goods traded in cannot be returned, the value thereof. Any acknowledgment by the buyer of delivery of a copy of the retail installment contract shall be in a size equal to at least ten-point bold type and shall appear directly above the buyer's signature.

(5) The retail installment contract shall contain the names of the seller and the buyer, the place of business of the seller, the residence or other address of the buyer as specified by the buyer, and a description of the motor vehicle sold or to be sold.

(6) The retail installment contract shall specifically set out the following items:

(a) The cash sale price of the motor vehicle;

(b) The amount of the buyer's down payment, if any, specifying the amounts paid in money and in goods traded in;

(c) The difference between items (a) and (b);

(d) The aggregate amount, if any, included for insurance if a separate identified charge is made therefor, specifying the type or types and the term of coverage;

(e) The aggregate amount of official fees, if a separate identified charge is made therefor;

(f) The principal balance, which is the sum of items (c), (d) and (e);

(g) The amount of the time price differential; and

(h) The sum of items (f) and (g), which is the balance to be paid by the buyer to the seller, the number of installments, the amount of each installment and the due date or period thereof. If installment payments other than the final payment are stated as a series of periodic payments equal in period and amount, the number of payments and the amount and due date of each payment need not be separately stated, and the amount of the scheduled final installment payment may be stated as the remaining unpaid balance. The due date of the first installment payment may be fixed by a calendar date or by reference to the date of the contract or to the time of delivery.

(i) If any installment (except the down payment) is more than double the average of all prior installments (except the down payment), the following legend printed in at least ten-point bold type or typewritten:

THIS CONTRACT IS NOT PAYABLE IN INSTALLMENTS OF EQUAL AMOUNTS

followed, if there be but one such larger installment, by:

AN INSTALLMENT OF $_____ WILL BE DUE ON _____,

or if there be more than one such larger installment, by:

LARGER INSTALLMENTS WILL BE DUE AS FOLLOWS: _____,

in such latter case, inserting the amount of every such larger installment and of its due date.

(j) The above items need not be stated in the sequence or order set forth; additional items may be included to explain the calculations involved in determining the balance to be paid by the buyer.

(7) The buyer's acknowledgment, conforming to the requirements of this Article, of delivery of a copy of the retail installment contract shall be conclusive proof of such delivery, that such contract when signed by the buyer did not contain any blank spaces except as herein provided, and of compliance with this Article in any action or proceeding by or against a holder of such contract without knowledge to the contrary when he purchases it.

(8) Upon written request of the buyer, the holder of a retail installment contract shall give or forward to the buyer a written statement of the dates and amounts of installment payments and the total amount unpaid under such contract. Such a statement shall be given the buyer once every six months without charge; if any additional statement is requested by the buyer, it shall be supplied by the holder at a charge not in excess of One Dollar for each additional statement. A

buyer shall be given a written receipt for any payment when made in cash.

Acts 1967, 60th Leg., p. 649, ch. 274, § 2, eff. Jan. 1, 1968.

## Art. 5069—7.03. Finance charge limitations

(1) Notwithstanding the provisions of any other law, the time price differential in a retail installment contract payable in substantially equal successive monthly installments beginning one month after the date of the contract shall not exceed the larger of Twenty-five Dollars or an amount determined under the following schedule:

Class 1. Any new domestic motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made and any new foreign motor vehicle—Seven Dollars and Fifty Cents per One Hundred Dollars per annum.

Class 2. Any new domestic motor vehicle not in Class 1 and any used domestic motor vehicle designated by the manufacturer by a year model of the same or not more than two years prior to the year in which the sale is made and any used foreign motor vehicle not more than two years old—Ten Dollars per One Hundred Dollars per annum.

Class 3. Any used motor vehicle not in Class 2 and, if a domestic motor vehicle, designated by the manufacturer by a year model not more than four years prior to the year in which the sale is made, and, if a foreign motor vehicle, not more than four years old—Twelve Dollars and Fifty Cents per One Hundred Dollars per annum.

Class 4. Any used motor vehicle not in Class 2 or Class 3—Fifteen Dollars per One Hundred Dollars per year. Provided, however, if the principal balance is Three Hundred Dollars or less, the time price differential shall be Eighteen Dollars per One Hundred Dollars per annum.

(2) Such charge shall be computed on the principal balance as determined under Article 7.02 of this Chapter from the date of the contract until the maturity of the final installment, notwithstanding that the balance thereof is required to be paid in installments.

(3) For a period less or greater than twelve months or for amounts less or greater than One Hundred Dollars, the amount of the maximum

charge set forth in the foregoing schedule shall be decreased or increased proportionately. A fractional monthly period of fifteen days or more may be considered a full month.

(4) If a retail installment contract is payable other than in substantially equal successive monthly installments, as where payable in irregular or unequal installments either in amount or periods thereof, or in equal successive monthly installments followed by or interspersed with an irregular, unequal or larger installment or installments, or in other than monthly installments or if the first installment is not payable one month from the date of the contract, the charge may not exceed an amount which, having due regard for the schedule of installment payments, will provide the same effective return as if the contract were payable in substantially equal successive monthly installments beginning one month from the date of the contract.

(5) A buyer under a retail installment contract may, upon written consent of the holder, transfer his equity in the motor vehicle at any time to another person, but in that event the holder shall be entitled to a transfer of equity fee not exceeding Twenty-five Dollars.

(6) The holder of any retail installment contract may collect a delinquency charge on each installment in default for a period of more than ten days in an amount not to exceed five percent of each installment or Five Dollars, whichever is less, or, in lieu thereof, interest after maturity on each such installment not to exceed the highest lawful contract rate. Provided, that only one such delinquency charge may be collected on any installment regardless of the period during which it remains in default. In addition, such contracts may provide for the payment of an attorney's reasonable fee where it is referred for collection to an attorney not a salaried employee of the seller or holder of the contract, and for court costs and disbursements, and in the event of repossession, sequestration, or other action necessary to secure possession of a motor vehicle securing the payment of a retail installment contract, such contracts may provide for the charge and collection of actual and reasonable out-of-pocket expenses incurred in connection with such repossession or foreclosure, including costs of storing, reconditioning and reselling such motor vehicle, subject to the standards of good faith and commercial reasonableness set by the Uniform Commercial Code as adopted in Texas.

Acts 1967, 60th Leg., p. 651, ch. 274, § 2, eff. Jan. 1, 1968.

## Art. 5069—7.04. Refunds on prepayment

Notwithstanding the provisions of any retail installment contract to the contrary, any buyer may prepay it in full at any time before maturity, and if he does so, shall receive the following refund credit thereon:

On a contract payable in substantially equal successive monthly installments commencing one month after the date of the contract, the amount of such refund credit shall represent at least as great a proportion of the finance charge, after first deducting therefrom an acquisition cost of Twenty-five Dollars, as (i) the sum of the monthly balances under the schedule of payments in the contract beginning as of the date after such prepayment which is the next succeeding monthly anniversary date of the due date of the first installment under the contract, or, if the prepayment is prior to the due date of the first installment under such contract, then as of the date after such prepayment, which is one month after the next succeeding monthly anniversary date of the date of such contract, bears to (ii) the sum of all the monthly balances under the schedule of payments in such contract. When the amount of refund credit is less than One Dollar no refund credit need be made. On contracts payable in other than substantially equal successive monthly installments commencing one month after the date of the contract, the refund shall be computed in a manner proportionate to the above-described method, having due regard to the amount of each installment, to the irregularity of each installment period and to the provisions of Sections (2) and (4) of Article 7.03 hereof.

Acts 1967, 60th Leg., p. 652, ch. 274, § 2, eff. Jan. 1, 1968.

## Art. 5069—7.05. Amendments of retail installment contracts

(1) The holder of a retail installment contract upon request by the buyer, may agree to an amendment thereto to extend or defer the scheduled due date of all or any part of any installment or installments or to renew, restate or reschedule the unpaid balance of such

contract, and may collect for same a charge not to exceed an amount computed under either of the following:

(a) If all or any part of any installment or installments is deferred for not more than three months the holder may at his election charge and collect on the amount deferred for the period deferred a charge computed at a rate which will not exceed the same effective return as is permitted on monthly payment contracts under Article 7.03; provided that the minimum charge shall be One Dollar. Such amendment may also include payment by the buyer of the additional cost to the holder of premiums for continuing in force any insurance coverages provided for in the contract and any additional necessary official fees.

(b) In any other extension, renewal, restatement or rescheduling of the unpaid balance, the charge may be computed as follows: The sum of the unpaid balance as of the date of amendment and the cost of any insurance incidental to the amendment, any additional necessary official fees, and any accrued delinquency and collection charges, after deducting the prepayment refund credit required by Article 7.04, shall constitute a principal balance on which the charge may be computed for the term of the amended contract at the applicable time price differential provided in Article 7.03 after reclassifying the motor vehicle by its year model at the time of the amendment. The provisions of this Chapter relating to minimum charges under Article 7.03 and acquisition costs under the refund schedule in Article 7.04 shall not apply in calculating the principal balance of the amended contract. The amendment to the contract must be confirmed in a writing signed by the buyer. The writing shall set forth the terms of the amendment and the new due dates and amounts of the installments; a copy thereof shall either be delivered to the buyer or mailed to him at his address as shown on the contract. Said writing together with the original contract and any previous amendments thereto shall constitute the retail installment contract.

Acts 1967, 60th Leg., p. 652, ch. 274, § 2, eff. Jan. 1, 1968.

## Art. 5069—7.06. Insurance

(1) On any retail installment contract made under the authority of this Chapter, a seller or holder may request or require a buyer to provide credit life insurance and credit health and accident insurance as additional protection for such contract, and include the cost of such insurance as a separate charge in such contract. Only one policy of life insurance and one policy of health and accident insurance on any one buyer may be in force with respect to any one loan contract at any one time.

(2) A seller or holder may, in addition, request or require a buyer to insure tangible personal property involved in such a contract, made under authority of this Chapter, and include the cost of such insurance as a separate charge in such contract. Such insurance and the premiums or charges therefrom shall bear a reasonable relationship to the amount, term and conditions of the contract, the existing hazards or risk of loss, damage or destruction, and shall not provide for unusual or exceptional risks or coverages which are not ordinarily included in policies issued to the general public.

(3) When insurance is required in connection with such a contract or agreement made under this Chapter, the seller or holder shall furnish the borrower a statement which shall clearly and conspicuously state that insurance is requested or required in connection with the contract, and that the buyer shall have the option of furnishing the required insurance either through existing policies of insurance owned or controlled by him or of procuring and furnishing equivalent insurance coverages through any insurance company authorized to transact business in Texas. In addition when any requested or required insurance is sold or procured by the seller or holder at a premium or rate of charge not fixed or approved by the State Board of Insurance, the seller or holder shall include such fact in the foregoing statement, and the buyer shall have the option for a period of five days from the date of the contract or agreement of furnishing the required insurance coverage either through existing policies of insurance owned or controlled by him or of procuring and furnishing equivalent insurance coverages through any insurance company authorized to transact business in Texas. Such statement or statements may be made in conjunction with or as part of the retail installment contract required by Article 7.02.

(4) Such insurance shall be written at lawful rates and in accordance with the provisions of the Texas Insurance Code by a company authorized to do business in this State.

(5) The contract or agreement must state the kind, coverage, term and amount of premium for such insurance.

(6) If dual interest insurance on the motor vehicle is purchased by the seller or seller's assignee, as the case may be, it shall within thirty days after execution of the retail installment contract, send or cause to be sent to the buyer a policy, or policies, or certificates of insurance written by an insurance company authorized to do business in this State, clearly setting forth the amount of the premium, the kind or kinds of insurance, the coverage and all the terms, options, limitations, restrictions and conditions of the policy or policies of insurance. The buyer shall have the privilege at the time of execution of the contract

of purchasing such insurance from an agent or broker of his own selection and of selecting an insurance company acceptable to the holder, but in such case the inclusion of the insurance premium in the retail installment contract shall be optional with the seller.

(7) If the insurance is cancelled, adjusted or terminated for any reason, the refund for unearned insurance premiums received by the seller or the holder shall be credited to the final maturing installments of the retail installment contract, and the remaining balance of the unearned insurance premiums shall be refunded to the buyer; provided, however, that no cash refund shall be required if the amount thereof is less than One Dollar.

(8) The retail installment contract shall clearly and conspicuously disclose whether or not bodily injury and property damage liability insurance is provided pursuant thereto.

(9) Any gain, advantage to the seller or holder, or any employee, officer, director, agent, general agent, affiliate or associate from such insurance or its provision or sale shall not be considered as an additional charge or further time price differential in connection with any retail installment contract made under this Chapter except as specifically provided herein.

Acts 1967, 60th Leg., p. 653, ch. 274, § 2, eff. Jan. 1, 1968.

## Art. 5069—7.07. Prohibited provisions

No retail installment contract or retail charge agreement shall:

(1) Provide that the seller or holder may accelerate the maturity of any part or all of the amount owing thereunder unless (a) the buyer is in default on the performance of any of his obligations or (b) the seller or holder in good faith believes that the prospect of payment or performance is impaired;

(2) Contain a power of attorney to confess judgment in this State or an assignment of wages;

(3) Authorize the seller or holder or other person acting on his behalf to enter upon the buyer's premises unlawfully or to commit any breach of the peace in the repossession of a motor vehicle;

(4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle;

(5) Contain any provision by which the buyer executes a power of attorney appointing the seller or holder or other person acting on his behalf, as the buyer's agent in the repossession of a motor vehicle;

(6) Provide that the buyer agrees not to assert against the seller or holder of any claim or defense arising out of the sale.

Acts 1967, 60th Leg., p. 654, ch. 274, § 2, eff. Jan. 1, 1968.

## Art. 5069—7.08. Assignment and negotiation

(1) Any person may purchase or acquire or agree to purchase or acquire any retail installment contract or any outstanding balance from any other person on such terms and conditions and for such price as may be mutually agreed upon;

(2) Notice to the buyer of the assignment or negotiation and any requirement that the seller be deprived of dominion over payments upon a retail installment contract, or over the motor vehicle if returned to or repossessed by the seller, is not necessary to the validity of a written assignment or negotiation of the retail installment contract or any outstanding balance as against creditors, subsequent purchasers, pledgees, mortgagees and lien claimants of the seller;

(3) Unless the buyer has notice of the assignment or negotiation of his retail installment contract, or any outstanding balance thereunder payment therefor made by the buyer to the holder last known to him shall be binding upon all subsequent holders;

(4) No right of action or defense of a buyer arising out of a retail installment sale which would be cut off by negotiation, shall be cut off by negotiation of the contract to any third party unless such holder acquires the contract in good faith and for value and gives notice of the negotiation to the buyer as provided in this Article, and within thirty days of the mailing of such notice receives no written notice of any facts giving rise to any claim or defense of the buyer. A notice of negotiation shall be in writing addressed to the buyer at the address shown on the contract and shall identify the contract, state the names of the seller and buyer; describe the motor vehicle; state the time balance and the number and amounts of the installments. The notice of negotiation shall contain the following warning to the buyer in ten-point bold face type:

IF YOU HAVE ANY COMPLAINT OR OBJECTION REGARDING THE GOODS OR SERVICES COVERED BY THE CONTRACT IDENTIFIED IN THIS NOTICE, OR ANY CLAIM OR DEFENSE RELATING TO SUCH CONTRACT, YOU MUST NOTIFY US WITHIN 30 DAYS FROM THE DATE THIS NOTICE WAS MAILED.

Acts 1967, 60th Leg., p. 655, ch. 274, § 2, eff. Jan. 1, 1968.

## Art. 5069—7.09. Application

None of the provisions of this Chapter shall affect or apply to any loans or to the business of making loans under or in accordance with the laws of this State, nor shall any of the provisions of the loan or interest statutes of this State affect or apply to any retail installment transaction. Nor shall any seller pay, promise to pay, or otherwise tender cash to any buyer as a part of any transaction made pursuant to this Chapter unless otherwise specifically authorized by this Chapter. Nothing in this Chapter shall be construed to impair or in any way affect any rule of law applicable to, or governing retail installment sales not otherwise subject hereto. This Chapter shall apply exclusively to all retail installment transactions as defined in Article 7.01.

Acts 1967, 60th Leg., p. 655, ch. 274, § 2, eff. Jan. 1, 1968.

# APPENDIX F

ACCOUNT NO. _____ **TEXAS AUTOMOBILE RETAIL INSTALMENT CONTRACT** DATE _____

Buyer (and Co-Buyer) — Name and Address (Include - County and Zip Code)

Seller — Name and Address

Buyer (which means the undersigned Buyers and Co-Buyers, jointly and severally) having been granted both a deferred payment price and a lower cash price hereby purchases from Seller on a deferred payment price basis, upon the terms and conditions set forth on the face and reverse sides hereof, the following property (hereinafter called the "Property") delivery and acceptance of which in good order hereby are acknowledged by Buyer.

| New or Used | Year and Make | Series | Body Style | No. Cyl. | If Truck Use GVW/Lbs. | Manufacturer's Serial Number | Use For Which Purchased |
|---|---|---|---|---|---|---|---|
| | | | | | | | |

INCLUDING: ☐ Radio ☐ Air Conditioner ☐ Automatic Transmission ☐ Power Steering ☐ Power Brakes ☐ Power Seats ☐ Power Windows ☐ _____

**DESCRIPTION OF TRADE IN**

_____ $ _____
(Year and Make) (Gross Allowance)

$ _____
(Amount Owing)

**OPTIONAL INSURANCE**

Buyer authorizes Seller to obtain the following insurance coverage:

(a) **Physical Damage Insurance:** Coverage checked below for a term of _____ months (or for such shorter term as the insurer to whom Seller shall apply for policy will provide for the amount included herein) from the date hereof, covering accidental physical damage to the Property based on actual cash value at the time of loss not to exceed policy limits payable to Buyer or Seller as interests may appear:

☐ $ _____ Deductible Comprehensive ☐ Fire, Theft & Combined Additional Coverage } $ _____ (a1)

☐ $ _____ Deductible Collision ☐ Towing & Labor Costs (_____ Limit) }

Physical Damage Insurance is required by this contract. If provided by Buyer pursuant to this contract, such insurance shall be payable to Buyer and Seller as interests may appear and shall provide coverage for the actual cash value of the Property at time of loss (i) for collision ($100 deductible unless a higher deductible amount is approved by Seller) and (ii) for fire, theft and combined additional or comprehensive coverage for the term of the contract; but, evidence of insurance for a lesser term will be acceptable provided the same is kept in force for the full term hereof. Buyer may choose the person through whom such insurance is to be obtained, and Buyer shall have the option of furnishing the required insurance through existing policies of insurance owned or controlled by him or obtained by him through any insurance company authorized to transact business in Texas.

☐ If checked, the premium for such insurance included herein is at a rate of charge not filed or approved by the State Board of Insurance of Texas.

**Liability Insurance Coverage For Bodily Injury And Property Damage Caused To Others Is Not Included**

(b) **Credit Life Insurance** on the life of _____ (Insured Person) for the term of this Contract

☐ Provided under Ford Life Insurance Company's Group Policy No. 2200 in accordance with the "Credit Life Insurance Eligibility" section below. Insured Buyer's Age _____ } $ _____ (b)

☐ Provided by _____ in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date.

(c) **Credit Accident and Health or Disability Insurance** provided by _____ for the term of this Contract in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date ..... $ _____ (c)

(d) **Other Optional Insurance** _____ (Itemized) ..... $ _____ (d)

**Total Cost of Optional Insurance** ..... $ _____

**NOTICE TO BUYER:** You are not required to obtain the Credit Life and/or Credit Accident and Health or Disability Insurance for which a charge is indicated above and such is not a factor in the Seller's approval of this credit. **ACKNOWLEDGING** the foregoing, **BUYER** requests and authorizes **SELLER** to obtain each insurance coverage for which an amount is included above.

Buyer _____ Date _____
(Cost of Insurance to be included only if signed by Buyer and dated)

**CREDIT LIFE INSURANCE ELIGIBILITY**

Credit Life Insurance under Ford Life Insurance Company's Group Policy No. 2200 is available only on the life of one natural person who is obligated to make payments under this retail instalment contract and who is under the age of 60 on the date hereof. Benefits will be limited to a refund of premiums if there is no person eligible for such insurance, or if death results from suicide within one year from the date hereof. For details see Notice of Proposed Group Credit Life Insurance on reverse side of Buyer's Copy.

The Insured Person (as defined in such Notice), in order to induce Ford Life Insurance Company to effect such insurance, hereby declares that to the best of his knowledge and belief he now is in good health and he hereby authorizes every physician or hospital, in the event of his death within one year from the date hereof, to disclose to Ford Life Insurance Company all information concerning his medical history prior to the date hereof.

The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the rear or side hereof.

Seller _____

By _____ Title _____

**DETAILS OF TRANSACTION**

**(INCLUDING DISCLOSURES REQUIRED BY FEDERAL LAW)**

| | | |
|---|---|---|
| (1) Cash Price* | | $ (1) |
| Cash Down Payment | $ | |
| Trade-In (See Opposite) | $ | |
| (2) Total Down Payment | | $ (2) |
| (3) Unpaid Balance of Cash Price (Difference between Items 1 & 2) | | $ (3) |
| (4) Other Charges | | |
| Optional Insurance (See Opposite) | $ | |
| Official Fees | $ | |
| Taxes (Not included in Cash Price) | $ | |
| Licenses, Title & Registration Fees | $ | |
| Total Other Charges | | $ (4) |
| (5) Unpaid Balance — Amount Financed* (Sum of Items 3&4) | | $ (5) |
| (6) FINANCE CHARGE* | | $ (6) |
| (7) ANNUAL PERCENTAGE RATE | | _____% (7) |
| (8) Total of Payments (Sum of Items 5 & 6) | | $ (8) |

(9) Payment Schedule: Buyer hereby agrees to pay to Seller the Total of Payments (Item 8 above) in _____ monthly instalments of $_____ each and one final instalment of $_____ on the _____ day of each month commencing _____ 19____, or, if no date is specified, one month after the date of this contract.

(10) Balloon Payment(s): This Contract is not Payable in Instalments of Equal Amounts.

☐ An instalment of $ _____ will be due on _____.

☐ Larger instalments will be due as follows:

$_____ on _____; $_____ on _____

(Insert amount of each payment that is more than twice the amount of any otherwise regularly scheduled equal payment) A balloon payment may be refinanced only upon such terms and conditions as the then parties to this contract may agree as of its due date.

(11) **Deferred Payment Price*** (Sum of Item 1,4 & 9) $_____ (11)

(12) **Delinquency Charge:** Buyer hereby agrees to pay a delinquency charge on each instalment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in effecting collection hereunder as may be allowed by law.

(13) **Security Interest:** Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds thereof to secure the payment in cash of the Total of Payments and all other amounts due or to become due hereunder.

(14) **Prepayment Rebate:** Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $25.00. No rebate will be made if the amount thereof is less than $1.00.

(15) **Additional Terms and Conditions:** The additional terms and conditions set forth on the reverse side hereof are a part of this contract and are incorporated herein by reference.

**NOTICE TO THE BUYER — DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE CONTRACT YOU SIGN. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE TIME PRICE DIFFERENTIAL. KEEP THIS CONTRACT TO PROTECT YOUR LEGAL RIGHTS.**

Buyer acknowledges receipt of a true and completely filled in copy of this contract at the time of signing.

Buyer Signs _____

Co-Buyer Signs _____

* INCONSISTENT STATE DISCLOSURES

The items of disclosures set forth above in the Details of Transaction are made in compliance with the Federal Truth in Lending Act. The following terms required by the Texas Motor Vehicle Installment Sales Act differ only with respect to terminology and are disclosed at the item numbers indicated: Cash Sale Price at Item (1); Principal Balance at Item (5); Time Price Differential at Item (6); and Time Sale Price at Item (11).

FMCC 11345 MAY 70 Previous editions may be used

| REV-1 | REV-2 | CYD | CHP |
|---|---|---|---|
| | | | |

ORIGINAL

## ADDITIONAL TERMS AND CONDITIONS

**16. ASSIGNMENT**
The original Seller may assign this contract and his assignee shall acquire all of his interest in this contract and the Property and shall be entitled to all the rights and privileges of Seller hereunder. After Buyer receives notice of any such assignment, Buyer shall make all payments hereunder directly to the holder and the original Seller shall not be the agent of the holder for transmission of payments or otherwise. Buyer shall not transfer or otherwise dispose of any interest in this contract or the Property.

**17. USE OF PROPERTY – WARRANTIES**
Buyer shall keep the Property free from all encumbrances, and any amount that may be paid by Seller in release or discharge thereof shall be paid by Buyer to Seller forthwith upon demand with interest at the highest lawful contract rate. Buyer shall not use the Property illegally, improperly or for hire (unless stated herein) and shall not remove the Property from the county of his residence without the written permission of Seller. No representation, promise or warranty, express or implied, has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller.

**18. RISK OF LOSS – INSURANCE**
The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require. The inclusion of a charge for insurance herein shall not relieve Buyer of such obligation but only authorizes Seller to attempt to obtain the requested coverages on Buyer's behalf through an authorized agent; provided, if Seller is unable to obtain the requested coverage for the term indicated for the amount included herein, Seller may (i) obtain such coverage for such term, if any, as the insurance carrier to whom Seller shall apply therefor will provide for such amount, or (ii) credit such amount to the final maturing installments hereunder in inverse order of maturity or as otherwise required by law.

If Buyer fails to obtain or maintain such insurance, or fails to furnish satisfactory evidence thereof upon request, Seller may, but shall not be required to, and without prejudice to his rights hereunder if he does not, obtain such insurance protecting either the interests of Buyer and Seller or the interests of Seller only. In such event, Buyer agrees to reimburse Seller for the cost thereof forthwith upon demand together with interest thereon at the highest lawful contract rate.

Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller.

**19. DEFAULT**
Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or Seller in good faith believes that the prospect of payment or performance hereunder is impaired, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and Seller shall have the right to repossess the Property wherever the same may be found with free right of entry, and to recondition and sell the same at public or private sale. Upon repossession, Buyer shall deliver the Property to Seller at a place designated by Seller. Seller shall have the right to retain all payments made prior to repossession and Buyer shall remain liable for any deficiency. Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession. Buyer agrees to pay reasonable attorneys' fees (15% if permitted by law) and other expenses incurred by Seller in effecting collection, repossession or resale hereunder. Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently. Waiver by Seller of any default shall not be deemed a waiver of any other default.

**20. GENERAL**
No transfer, renewal, extension or assignment of this contract or any interest hereunder, and no loss, damage or destruction of or to the Property, shall release Buyer from his obligations hereunder. This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller. Any provision of this contract prohibited by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract. This contract shall be governed by the laws of the state in which the original Seller is located as shown on the face of this contract.

## GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guarantee the prompt and unconditional payment, performance and discharge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upon demand the full amount remaining unpaid thereunder together with reasonable attorneys' fees (15% of the amount then due, or if prohibited, the amount permitted by law) if placed with an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change in the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payment thereof, or the release or non-perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. Each of the undersigned guarantors hereby waives notice of the acceptance of this guaranty, and of presentment, demand and protest and notices of non-payment and dishonor, and any other demands and notices required by law, and waives all setoffs and counterclaims.

Guarantor _____ Address _____

Guarantor _____ Address _____

## ASSIGNMENT

The Seller named on the face of this contract sells, assigns, and transfers to Ford Motor Credit Company (hereinafter called "Ford Credit") his, its or their entire right, title and interest in and to the within contract and the Property described therein and authorizes Ford Credit to do every act and thing necessary to collect and discharge obligations arising out of or incident to the within contract and assignment. In order to induce Ford Credit to accept assignment of the within contract, the Seller warrants that: the within contract, and guaranty if any, are genuine, legally valid and enforceable and arose from the sale of said Property; said Property is as represented to the Buyer named therein who was quoted both a deferred payment price and a lower cash price; the within contract was complete in all respects and Seller made all disclosures required by law prior to the execution thereof by Buyer; the Buyer is not a minor, has capacity to contract and paid the down payment stated in the within contract with his own funds; all statements made by or on behalf of the Buyer and furnished to Ford Credit by the Seller are true to the best of the Seller's knowledge and belief, and the Seller has no knowledge of any fact that would impair the validity or value of the within contract; title to said Property is vested in the Seller free of all liens and encumbrances and the Seller has the right to assign said title; and a certificate of title to said Property showing a lien or encumbrance for the benefit of Ford Credit or the Seller has been or will be applied for forthwith if permitted by law. If there is any breach of any of the foregoing warranties, without regard to the Seller's knowledge or lack of knowledge with respect thereto or Ford Credit's reliance thereon, the Seller hereby agrees unconditionally to purchase the within contract from Ford Credit, upon demand, for the full amount then unpaid whether the within contract shall then be, or not be, in default. Seller further agrees that in event Buyer or any other person makes a claim against Ford Credit alleging facts which, if true, would constitute a breach of any of the foregoing warranties, Seller shall assume the defense of such claim and shall indemnify and save Ford Credit harmless from all loss, cost and expenses arising therefrom. In addition, this assignment includes the provisions of the paragraph initialed by the Seller below, provided, that if none of the paragraphs below has been initialed by the Seller, this assignment shall include the provisions of the paragraph below and entitled "Repurchase." The liability of the Seller shall not be affected by any extension, renewal or other change in the time of payment of the within contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for payment thereof or the release or non-perfection of any security thereunder. Ford Credit shall not be bound to exhaust its recourse against the Buyer or any other person or any security Ford Credit may at any time have before being entitled to payment from the Seller hereunder. The Seller waives notice of the acceptance of this assignment and notice of non-payment and non-performance of the within contract and any other notices required by law and waives all setoffs and counterclaims. This assignment shall become effective upon delivery of the within contract to Ford Credit or upon Ford Credit's payment of the purchase price therefor whichever first occurs.

☐ Initial "WITHOUT RECOURSE" The assignment of said contract is and shall be without recourse against the Seller, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial "REPURCHASE" The Seller guarantees payment of the full amount remaining unpaid under said contract, and covenants if default be made in payment of any installment thereunder to pay the full amount then unpaid to Ford Credit upon demand, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial "LIMITED REPURCHASE" The Seller guarantees payment of the full amount remaining unpaid under said contract, and covenants, if default be made in payment of any installment thereunder to pay the full amount then unpaid to Ford Credit, upon demand, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted provided, that if the Buyer satisfactorily pays each of the first _____ installments coming due under the within contract, this assignment shall thereafter be without recourse against the Seller, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial "PARTIAL GUARANTY" Notwithstanding the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted, the Seller unconditionally guaranties payment of the full amount remaining unpaid under said contract, and agrees to purchase said contract from Ford Credit upon demand for the full amount then unpaid whether said contract shall then be, or not be, in default, provided, however, at the time of any such demand by Ford Credit, Seller may, at his election, pay to Ford Credit the sum of $_____ in consideration of being released from such guaranty obligation, and in such event, the assignment of said contract is without recourse against the Seller, except as otherwise provided by the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted.

☐ Initial "FULL GUARANTY" Notwithstanding the terms of the Ford Motor Credit Company Retail Plan in effect at the time this assignment is accepted, the Seller unconditionally guaranties payment of the full amount remaining unpaid under said contract, and agrees to purchase said contract from Ford Credit, upon demand, for the full amount then unpaid whether said contract shall then be, or not be, in default.

## APPENDIX G

IN THE

# 53rd Judicial District Court

OF

TRAVIS COUNTY, TEXAS

No. 279,722

ARNULFO ZAPATA

v.

YATES FORD, INC. and

FORD MOTOR CREDIT COMPANY

## AFFIDAVIT OF EMBREE HULSEY

STATE OF TEXAS }
COUNTY OF NUECES }

BEFORE ME, the undersigned Notary Public, on this day personally appeared EMBREE HULSEY, known to me to be the person whose name is subscribed hereto, who, after being by me first duly sworn, upon his oath stated the following:

"1. My name is Embree Hulsey. I am over 18 years of age, am of sound mind, have never been convicted of any crime or offense, and have personal knowledge of the statements made herein. I am fully competent to testify as to the matters stated herein.

2. I am presently employed as Assistant Branch Manager of the Corpus Christi Branch Office of Ford

Motor Credit Company (hereinafter "Ford Credit"), and have been so employed since December 1, 1978. I have worked for Ford Credit in various other capacities for 8 years. I am familiar with the procedures and practices of Ford Credit at all times pertinent to this lawsuit (from 1976 through the present).

3. Ford Credit is the present holder of a Texas Automobile Retail Installment Contract (hereinafter called "the Contract") dated July 15, 1976 and executed by Plaintiff Arnulfo R. Zapata. Ford Credit purchased the Contract from Defendant Yates Ford, Inc. on or about July 19, 1976.

* * * *

10. Ford Credit has never repossessed or threatened to repossess the vehicle purchased by Plaintiff pursuant to the Contract.

12. I am familiar with the repossession operations of this office and with the policies of this office regarding repossession of motor vehicles securing retail installment contracts. In the majority of instances in which this office of Ford Credit repossesses the vehicle of a buyer who has defaulted under a retail installment contract, the repossessed vehicle is returned by Ford Credit to the custody of the selling dealer within 48 hours of the repossession. In instances in which this office directs the repossession of a motor vehicle outside the Corpus Christi area, the repossessor customarily delivers the vehicle to the custody of a licensed carrier to delivery to the selling dealer. In such instances, the car may never be inspected by an employee of this office.

13. When a car is repossessed by an employee of this office, the vehicle is inspected for personalty within

a few hours of the repossession. Commonly in such situations, this office does not have access to a key to the trunk of the vehicle, and consequently the trunk is not inspected. If the inspection results in the discovery of personalty contained in the vehicle, the personalty is removed, inventoried, and held for the debtor of this office. If any personalty is so recovered, an employee of this office attempts to contact the debtor by phone, to notify him of the existence and location of the items, and to encourage him to come to this office to claim and remove the items. If this office is unable to reach the debtor by phone, or if the debtor fails to reclaim the items within several days of the phone contact, the items are customarily packaged by this office and mailed or sent by bus to the debtor's last known address.

14. I have been an employee of Ford Credit for eight years and am familiar with the vehicle repossession record and experience of Ford Credit. To my knowledge, this office has never refused to surrender to any debtor any personalty which was contained in the debtor's vehicle at the time of repossession, in the fact of a demand by the debtor. To my knowledge, this office has consistently attempted to return such personalty, even absent a demand on the part of the debtor."

.....

EMBREE HULSEY

SUBSCRIBED AND SWORN to, before me on the 4th day of April, 1979.

(SEAL)

.....

Notary Public in and for
Nueces County, Texas

My commission expires: .....

## APPENDIX H

### Subsidiaries of Ford Motor Company.

*DOMESTIC AFFILIATES*

Ford Credit — Canada Limited
Ford Motor Credit Company International
The American Road Insurance Company
Ford Life Insurance Company
Vista Insurance Company
Vista Life Insurance Company
American Road Services Company
American Road Equity Corporation
Ford Consumer Credit Company
Ford Motor Credit Company of Iowa
Ford Consumer Discount Company
Philco Finance Corporation
Canadian Road Credit Company, Limited
Ford Credit Equity Corporation
Ford Motor Company (Delaware)
Eveleth Taconite Company (Delaware)
Ford Products Company (Delaware)
Ford Communications, Inc. (Delaware)
Environ Inc. (Delaware)
Ohio Production Corporation (Delaware)
Predelivery Service Corporation (Delaware)
Ford Export Corporation (Delaware)
Ford Motor Land Development Corporation (Delaware)
Detroit Downtown Development Corporation (Delaware)
Ford Motor Properties, Inc. (Delaware)
Greenfield Properties, Inc. (Delaware)
Ghia, Inc. (Delaware)
Rise Services Incorporated (Delaware)
Dearborn Capital Corporation (Delaware)
Ford Leasing Development Company (Delaware)
Manhattan Ford, Lincoln-Mercury, Inc. (Delaware)

Ford Motor Dealership Facilities Company (Delaware)
Parklane Insurance Company (Michigan)
Ford Aerospace and Communications Corporation (Delaware)
Logistic Services Corporation (Delaware)
Aeronutronic Overseas Services, Inc. (Delaware)
Aeronutronic Services Corporation (Delaware)

*FOREIGN AFFILIATES*

Compania Financiera de Inversiones Y Credito S.A. (Argentina)
Ford Credit Australia, Limited
Ford Credit Australia Wholesale, Limited
Ford Credit N.V. (Belgium)
Ford Financiadora S.A. (Brazil)
Ford Distribuidora Ltd. (Brazil)
Ford Credit A.S. (Denmark)
Credit Ford S.A. (France)
Ford Credit Bank AG (Germany)
Henry Ford & Son (Finance) Limited (Ireland)
Ford Credit S.p.A. (Italy)
Ford Finance Company of Japan, Limited (Japan)
Ford Credit B.V. (Netherlands)
Ford Motor Credit Company of New Zealand, Ltd.
FCP Finance Corporation (Philippines)
FCP Credit Corporation (Philippines)
Ford Credit South Africa (Proprietary) Limited
Ford Credit S.A. (Spain)
For Leasing S.A. (Spain)
Ford Credit A.B. (Sweden)
Ford Credit S.A. (Switzerland)
Ford Motor Credit Company, Limited (United Kingdom)
Automotive Finance Limited (United Kingdom)
Ford Financial Trust Limited (U.K.)
Ford Motor Compania Comercial, S.A. de C.V. (Mexico)

Ford International Capital Corporation (Delaware)
Ford International Finance Corporation (Delaware)
Transcon Insurance Limited (Bermuda)
Ford Motor Company Caribbean, Inc. (Puerto Rico)
Fordson Coal Company (Delaware)
Ghia, S.p.A. (Italy)
Ford Latin America, S.A. de C.V. (Mexico)
Philco Corporation of Canada, Limited
Philco Radio E Televisao, Ltda (Brazil)
Philco Da Amazonia, Ltda (Brazil)
Philco Industria Brasileira de Semiconductores, Ltda. (Brazil)
Philco Gmbil (West Germany)
Dearborn Capital Corporation (Delaware)
Ford Motor Company of Canada, Limited
Ford Motor Company of Australia Limited
Ford Sales Company of Australia Limited
Ford Motor Company of New Zealand Limited
Ford Motor Company Private, Limited (Singapore)
Ford Motor Company of South Africa (Proprietary) Limited (South Africa)
Ensite Limited (Canada)
Essex Manufacturing (a Partnership) (Canada)
Mariveles Stamping Plant Branch (Philippines)
Ford Lio Ho Motor Company, Ltd. (Taiwan)
Ford Asia-Pacific, Inc. (Delaware)
Ford Philippines, Inc. (Philippines)
Ford Motor Company (Japan) Ltd. (Japan)
Ford Motor Company of Malaysia, Sdn. Bhd. (Malaysia)
Japan Automatic Transmission Company, Ltd. (Japan)
Ford Motor Argentina S.A. (Argentina)
Metalurgica Constitucion S.A. (Argentina)
Transax, S.A. Commercial Industrial Y Financiera (Argentina)

Plan Ovalo S.A. (Argentina)
Ford Motor Company S.A. (Mexico)
Ford Motor Company del Peru, S.A. (Peru)
Ford Motor Company del Venezuela (Venezuela)
Productos Industrailes, C.A. (Venezuela)
Ford Brasil, S.A. (Brazil)
Sao Francisco, Ltda Maquinas E Ferramentas (Brazil)
Bongotti S.A. Industria E. Comercio de Radiadores (Brazil)
Ford Administracao e Consorcios Ltda (Brazil)
Transglobal-Corretagem de Seguros, Ltda (Brazil)
Ford (Uruguay) S.A. (Uruguay)
Ford Mid-East and Africa, Incorporated (Delaware)
Ford Motor Company (Egypt) S.A.E., Alexandria (Egypt)
Ford Motor Company, Limited (England)
Ford Tractor (Belgium) Limited (Belgium)
Henry Ford & Son, Limited (Ireland)
Henry Ford and Son (Sales) Limited (Ireland)
Dagenham Motors Limited (England)
Ford Personal Import Export, Ltd. (England)
Ford-Werke AG (Germany)
Genk, Belgium Branch
Saar-Industrie, Gmbil (Germany)
Ford Verisicherungs Vermittlungs, Gmbil (Germany)
Ford Motor Company (Austria) K.G. (Austria)
Ford-Versorgungs-und-Unterstutzungseinrichtung-Gmbil (Germany)
Ford Investitions-Gmbil (Germany)
Ford Investitions-Gmbil & Co. oHG (Germany)
Ford Espana, S.A. (Spain)
Ford Leasing S.A. (Spain)
Ford of Europe Incorporated (Delaware)
Ford Motor Company (Belgium) N.V. (Belgium)
Ford Motor Company (Switzerland) S.A. (Switzerland)

Ford Motor Company A/S (Denmark)
Ford Motor Norge A.S. (Norway)
Eik and Hausken A/S (Norway)
O/Y Ford A/B (Finland)
Ford France S.A. (France)
Ford Italiana S.p.A. (Italy)
Ford Lusitana S.A.R.I. (Portugal)
Ford Motor Company Aktiebolag (Sweden)
Ford Nederland N.V. (Netherlands)

# Appendix

81-467

Office of the U.S.
SEP 8 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1981

No. .....

FORD MOTOR CREDIT COMPANY
AND
YATES FORD, INC.,

*Appellants,*

VS.

ARNULFO R. ZAPATA,

*Appellee.*

## APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

## SUPPLEMENTAL APPENDIX TO APPELLANTS' JURISDICTIONAL STATEMENT

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# TABLE OF CONTENTS

Page

Appendix A. Opinion of the Texas Supreme Court, dated May 6, 1981 ..... A-1

Appendix B. Opinion of the Court of Civil Appeals of Texas, Beaumont, dated August 14, 1980 ..... B-1

IN THE

# Supreme Court of The United States

OCTOBER TERM, 1981

No. .....

FORD MOTOR CREDIT COMPANY

AND

YATES FORD, INC.,

*Appellants,*

VS.

ARNULFO R. ZAPATA,

*Appellee.*

## APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

## SUPPLEMENTAL APPENDIX TO APPELLANTS' JURISDICTIONAL STATEMENT

Pursuant to the Rules of the Supreme Court of the United States, Appellants Ford Motor Credit Company and Yates Ford, Inc., file this Supplemental Appendix to their Jurisdictional Statement filed herein on August 31, 1981. The Appendices reprinted herein are submitted in place of Appendices A and B in that Jurisdictional State-

ment, which were not reproduced in accordance with the type-size requirements of this Court.

Respectfully submitted,

*Original Signed By*
*RANDALL A. HOPKINS*

RANDALL A. HOPKINS
*Counsel of Record for Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Supplemental Appendix to Appellants' Jurisdictional Statement have been sent to all parties required to be served herein, including James G. Boyle, 609 Stewart Title Building, 812 San Antonio Street, Austin, Texas 78701, and the Attorney General of the State of Texas, Courts Building, Post Office Box 12548, Capitol Station, Austin, Texas 78711. Said copies were sent by certified mail, return receipt requested, on this 3rd day of ~~August~~ September, 1981.

*Original Signed By*
*RANDALL A. HOPKINS*

RANDALL A. HOPKINS

## APPENDIX A

ARNULFO ZAPATA,

*Petitioner,*

v.

FORD MOTOR CREDIT COMPANY, *et al.*,

*Respondents.*

No. B-9889.

# Supreme Court of Texas

May 6, 1981.

Rehearing Denied June 3, 1981.

---

McGEE, Justice.

Arnulfo R. Zapata sued Yates Ford, Inc. and Ford Motor Credit Company (FMCC) for statutory penalties, alleging that certain provisions in a retail installment contract violate the Texas Consumer Credit Code.[1] The trial court granted Zapata's motion for partial summary judgment and, after a nonjury trial on the issue of attorney's fees, rendered final judgment against Yates Ford and Ford Motor Credit Company. The court of civil appeals reversed the judgment of the trial court and rendered judgment that Zapata take nothing. 605 S.W.2d 362 (Tex.Civ.App.1980). We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

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[1] Title 79 (Article 5069, Tex. Rev. Civ. Sta. Ann.) is not a code which has been promulgated pursuant to this State's continuing statutory revision program. However, for convenience and clarity we will refer to Article 5069 throughout this opinion as the "Credit Code" or "Code." All statutory references are to sections under Article 5069, unless otherwise noted. All emphases are ours.

On July 15, 1976, Zapata purchased a new pickup truck from Yates Ford in Austin, Texas. He financed the purchase by executing a retail installment contract which was later assigned to FMCC. The contract was on a preprinted form prepared and supplied by FMCC. Twenty-six months later, in September 1978, Zapata sued to recover a $2,000 statutory penalty and reasonable attorney's fees under section 8.01(b) for violations of the Credit Code.[2] When suit was filed, Yates Ford and FMCC had not repossessed or attempted to repossess the truck; Zapata was current in his obligations under the contract, and Zapata claimed no actual damages. The recovery sought by Zapata is purely penal in nature.

Zapata moved for a partial summary judgment. He alleged the retail installment contract contained seven violations of the Credit Code.[3] The trial court granted the motion and assessed a $2,000 penalty against Yates Ford and FMCC but did not say on which violation it based its ruling. After a trial on the issue of attorney's fees, the trial court rendered final judgment against Yates Ford and FMCC, jointly and severally, for a $2,000 penalty and

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[2] Section 8.01(b) provides:

"(b) Any person who violates this Subtitle or Chapter 14 of this Title by (i) failing to perform any duty or requirement specifically imposed on him by any provision of this Subtitle or Chapter 14 of this Title, or by (ii) committing any act or practice prohibited by this Subtitle or Chapter 14 of this Title, shall be liable to the obligor for a penalty in an amount equal to twice the time price differential or interest contracted for, charged, or received but not to exceed $2,000 in a transaction in which the amount financed is $5,000 or less. . . ."

[3] Zapata alleged the retail installment contract violated the Credit Code in the following respects: (1) failure to clearly and conspicuously disclose the amount charged for the mechanical breakdown insurance in violation of Article 5069-7.06(8); (2) overcharge of the license, title and registration fees which is unauthorized by Article 5069-7.01(f); (3) false labeling of required insurance as optional insurance in violation of Article 5069-7.06(3); (4) failure to properly identify Ford Motor Credit Com-

$5,000 in attorney's fees. The court of civil appeals reversed the judgment and rendered judgment that Zapata take nothing. The court of civil appeals ruled against Zapata on each alleged violation.

We granted Zapata's application for writ of error on two points of error. In the first point, Zapata contends the waiver clause in paragraph nineteen (19) of the retail installment contract violates section 7.07(4) of the Code. This section prohibits waiver of buyer's rights of action against a seller in installment contracts for illegal acts committed in the repossession of a motor vehicle. In the second point, he argues the retail installment contract fails to "clearly and conspicuously" disclose that physical damage insurance is required in violation of section 7.06(3) of the Code. We hold the waiver clause violates section 7.07(4). Thus, we find it unnecessary to discuss Zapata's point concerning a violation of section 7.06(3) because a single violation of the Code will trigger the penalties under section 8.01.

The waiver clause is found in paragraph nineteen (19) on the back of the contract. It provides:

> "Any personality in or attached to the property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."

---

pany as a creditor in violation of Art. 5069-14.11(a); (5) improperly reserving a security interest in unearned premiums on the reverse side of the contract in violation of Art. 5069-14.17(a)(1); (6) including the overcharge of the license, title and inspection fee charged in the Amount Financed thereby charging an undisclosed finance charge in violation of Article 5069-14.04; (7) waiver of the act of illegally converting personalty committed in connection with repossession of the collateral, in violation of Article 5069-7.07(4).

Zapata contends the second part of the waiver clause, which provides ".... Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession," violates section 7.07(4) of the Code. He relies on *Southwestern Investment Company* v. *Mannix*, 557 S.W.2d 755 (Tex. 1977), and *Ford Motor Credit Company* v. *Cole*, 503 S.W.2d 853 (Tex. Civ. App. — Fort Worth 1973, writ dism'd).

Section 7.07(4) provides:

"No retail installment contract or retail charge agreement shall:

> "(4) *Provide for a waiver of the buyer's rights of action against the seller or holder* or other person acting therefor *for any illegal act committed,* in the collection of payments under the contract or agreement or *in the repossession of a motor vehicle;* ..."

In *Southwestern Investment Company* v. *Mannix, supra* the question was whether a provision in a retail installment contract of goods violated section 6.05(4) of the Code. The statutory language in section 6.05(4) is identical to the statutory in section 7.07(4). However, section 6.05(4) applies to retail installment sales of goods generally and section 7.07(4) applies exclusively to motor vehicle installment sales. The contract provision in *Mannix* provided:

"Nothing shall prevent the Secured Party from removing [the property] from any premises to which same may be attached, upon default or breach of this Retail Installment Contract and Security Agreement or any part thereof, and the Debtor agrees to sustain the cost of repairs, if any, of any physical injury to the real estate caused by such removal."

In *Mannix*, we held this provision violated section 6.05(4) because it waived a buyer's right of action for a tort committed in the repossession of goods. We explained the Legislature intended for such unconscionable contract provisions to be unforceable and to penalize creditors for including these provisions in installment contracts.

In *Ford Motor Credit Company* v. *Cole, supra*, the same waiver clause was before the Fort Worth Court of Civil Appeals. That was a venue case where the court stated it would not be permissible to construe the waiver clause to exempt Ford Motor Credit Company from liability should it convert or deprive the buyer of use of unsecured property. This construction of the clause, the court concluded, would be unenforceable as contrary to the public policy of this State.

The parties concede the first part of the waiver clause, which provides "[a]ny personalty in or attached to the property when repossessed may be held by Seller without liability . . . ," merely restates the bailor-bailee relationship existing at common law with respect to personalty in a repossessed vehicle. However, a person in lawful possession of personalty may still be guilty of trespass or conversion for its unlawful detention. A detention of personalty lawfuly obtained, after demand, is a wrongful act constituting a trespass. *Brite* v. *Pfeil*, 334 S.W.2d 596 (Tex. Civ.App. — San Antonio 1960, no writ); *see Mountain States Tel. & Tel. Co.* v. *Vowell Construction Co.*, 161 Tex. 432, 341 S.W.2d 148 (1960). The commission of a trespass does not necessarily mean the actor will be liable for damages. Restatement (Second) of Torts § 217, Comment a (1965). Liability does not attach, unless the wrongful detention is accompanied by actual damage to the property or deprives the owner of its use for a substantial period of time. *See Lyle* v. *Waddle*, 144 Tex. 90, 188 S.W.2d 770 (1945); Restatement (Second) of Torts § 218 (1965). Even

in the absence of damages, a trespass has occurred which is important in determining the legal relations between the parties.[4]

If the wrongful detention seriously interferes with the owner's right to control the personalty, there is not only a trespass but a conversion which justifies an action to require the actor to pay the full value of the personalty. *Smith* v. *Texas & N. O. Ry. Co.*, 101 Tex. 405, 108 S.W. 819 (1908); *Norris* v. *Bovina Feeders, Inc.*, 492 F.2d 502 (5th Cir. 1974). Section 237 of the Restatement of Torts (Second) reads: "One in possession of a chattel as bailee or otherwise who, on demand, refuses without proper qualification to surrender it to another entitled to its immediate possession, is subject to liability for conversion." Trespass and conversion are torts designed to protect against interferences with one's possessory interest in personalty. They are "illegal acts" within the meaning of section 7.07(4) of the Credit Code. *See Southwestern Investment Company* v. *Mannix, supra.*

The waiver clause in this case waives a buyer's right of action for the wrongful detention of unsecured personalty taken in the repossession of a motor vehicle. If the buyer fails to demand his property within 24 hours after repossession, all claims for its subsequent wrongful detention are waived. The fact the wrongful detention waived does not

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[4] Comment a to § 217 of the Restatement (Second) of Torts states in part:

> "A trespass, though not actionable . . ., may nevertheless be important in the determination of the legal relations of the parties. Thus, the fact that one person is committing a trespass to another's chattel, while it may not be actionable because it does no harm to the chattel or to any other legally protected interest of the possessor, afford the possessor a privilege to use force to defend his interest in its exclusive possession . . . . So too, the fact that one person is a trespasser is important in determining the duty of care owing to him by the possessor of the chattel . . . ."

occur until at least 24 hours "after repossession" and not "in the repossession" as stated in section 7.07(4) is immaterial because the doctrine of trespass ab initio is followed in Texas. *See Humphreys Oil Co.* v. *Lile,* 262 S.W. 1058 (Tex.Civ.App.—Waco 1924), *aff'd,* 277 S.W. 100 (Tex. Comm'n. App. 1925, judgment adopted); *Brite* v. *Pfeil, supra, American Mortgage Corp.* v. *Wyman,* 41 S.W.2d 270 (Tex.Civ.App.—Austin 1931, no writ); and *Lyles v. Meyer,* 293 S.W. 295 (Tex.Civ.App.—San Antonio 1927, writ ref'd). Under this doctrine, a wrongful detention of unsecured personalty 24 hours after repossession, by one in lawful possession, is a trespass from the time of repossession. *Id.* This waiver clause is not only contrary to public policy, *see Ford Motor Credit Company* v. *Cole, supra,* but it is also prohibited by section 7.07(4) of the Credit Code.

Yates Ford and FMCC argue that the waiver clause does not waive a buyer's "right of action" but merely his claim to the personalty in the reposseessed vehicle. They also urge the word "deemed" in the waiver clause only amounts to a rebuttable presumption of a waiver and not a conclusive presumption. The use of the word "deemed" and "claim" does not save a contract clause which otherwise violates section 7.07(4). The construction placed upon this contract language by Yates Ford and FMCC is contrary to the express legislative intent in enacting the Credit Code.

We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

## APPENDIX B

FORD MOTOR CREDIT COMPANY, *et al.*,

*Appellants,*

v.

ARNULFO ZAPATA,

*Appellee.*

No. 8481.

# Court of Civil Appeals of Texas, Beaumont.

August 14, 1980.

Rehearing Denied September 25, 1980.

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KEITH, Justice.

Defendants below appeal from an adverse judgment rendered in a suit brought under the Texas Consumer Credit Code, Chapters 7 and 14.[1] Plaintiff's motion for partial summary judgment was granted and damages of $2,000 were assessed against the defendants under the provisions of § *8.01(b)* of the Code. The Court, after a bench trial, awarded plaintiff $5,000 in attorney's fees and merged the partial summary judgment into a final judgment from which this appeal has been perfected.

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[1] Tex.Rev.Civ.Stat.Ann. arts. 5069-7.01 through 5069-7.10 and 5069-14.01 through 5069-14.28 (1971-1979 Pamp.Supp.). Chapter 14 was repeated by Acts 1979, 66th Leg., p. 1595, ch. 672, § 51, effective August 27, 1979. All subsequent references to the Consumer Credit Code shall be to the sections thereof unless otherwise indicated.

The judgment is joint and several against the two defendants but neither seeks indemnity nor contribution from the other and separate briefs have been filed by each defendant.

In July 1976, plaintiff purchased a new pickup truck from the defendant Yates Ford, Inc., financing the purchase by executing a retail installment contract which was assigned to Ford Motor Credit Company a few days later. More than two years later, in September of 1978, plaintiff sued the seller and the finance company asserting that the contract which he signed did not comply with several provisions of the Code. At the time he sued, he was current in his obligations under the contract and he made no effort to show any actual damages had been sustained. The defendants did not file cross-action against plaintiff.

His motion for summary judgment mirrored the allegations of his third amended petition wherein he sought relief because of alleged violations of several sections of the Code as noted in the margin.[2] The motion was sustained generally and we have no indication that one or more of the grounds set out in the motion for summary judgment was not sustained.

A single violation of the Code is sufficient to trigger the penalty under § *8.01(b)*. *Chapman* v. *Miller*, 575 S.W.2d 581, 583 (Tex.Civ.App. — Beaumont 1978, writ ref'd n.r.e.). Thus, defendants labor under the burden of establishing that the trial court erred as to each of the seven alleged violations. Conversely, if one violation is shown to have been established as a matter of law by the summary judgment proof, the judgment must be affirmed as the other alleged violations become immaterial.

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[2] Plaintiff sought relief under the following sections of the Code: §§ 7.01(f), 7.06(3), 7.06(8), 7.07(4), 14.04, 14.11(a), and 14.17(a)(10).

In order to narrow the question even more, we first address defendants' contentions that the repeal of Chapter 14 of the Code by the Legislature in 1979, *without a savings clause,* destroyed plaintiff's cause of action for penalties under such chapter. The effective date of the repeal was August 27, 1979. Acts 1979, 66th Leg., p. 1595, ch. 672, § 51. The judgment was signed on July 10, 1979.

The sole base for plaintiff's recovery is the statute, no common law cause of action having been asserted, and he has made no effort to show any actual damages were sustained. Thus, the language used by the Court in *Dickson* v. *Navarro County Levee Imp. Dist. No. 3,* 135 Tex. 95, 139 S.W.2d 257, 259 (1940), is appropriate:

> "It is almost universally recognized that if a statute giving a special remedy is repealed, without a saving clause in favor of pending suits, all suits must stop where the repeal finds them; and, if final relief has not been granted before the repeal goes into effect, it cannot be granted thereafter. A like general rule is that if a right to recover depends entirely upon a statute, its repeal deprives the court of jurisdiction over the subject matter."

The rule so announced is still viable. See *Harris County* v. *Suburban Utility Co.,* 547 S.W.2d. 72, 74 (Tex.Civ.App. - Houston [1st Dist.] 1977, no writ).

In considering the question before us, the opinion of the Supreme Court, quoting from recognized text and authoritative decisions in *National Carloading Corp.* v. *Phoenix-El Paso Express,* 142 Tex. 141, 176 S.W.2d 564, 569 (1943), is dispositive. After holding that the courts are agreed that rights based upon purely statutory grounds may be abolished '"even after they have accrued'", the Court continued:

> " 'The courts have been particularly uniform in reaching this conclusion where the right of action is in the nature of a claim by an individual for the recovery of a statutory fine, penalty, or forfeiture.' "

Even more to the point in this case is further language used in *National Carloading Corp.:*

> "If, before rights become vested in particular individuals, the convenience of the State induces amendment or repeal of the laws upon which they are based, these individuals are left without any remedy at law to enforce their claims; *and if final relief has not been granted before the repeal goes into effect it cannot be granted thereafter, even if a judgment has been entered and the cause is pending upon appeal.*" (176 S.W.2d at 570, emphasis supplied)

Plaintiff argues that since Chapter 14 is mentioned in several places in the unrepealed portions of the Code, the "repealer" should be given effect only prospectively. We have given consideration to the argument but remain unpersuaded. If the Legislature cared to protect rights which had accrued under the provisions of Chapter 14, "it would have been a simple matter to have so stated." *First State Bank of Bedford* v. *Miller,* 563 S.W.2d 572, 577 (Tex. 1978). Legislative oversight cannot be used to breathe life into a dead statute.

Making application of the rules set forth in *Dickson* and *National Carloading,* supra, we are of the opinion that plaintiff's recovery may not be sustained upon any claim resting upon an alleged violation of the provisions of Chapter 14 of the Code. Consequently, we sustain point sixteen in the brief of each defendant.[3]

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[3] "The trial court erred in granting summary judgment for the appellee under Tex.Rev.Civ.Stat.Ann., Art. 5069–14.01 et seq. because the Texas Legislature's repeal of Chapter 14 eliminated the appellee's cause of action and right to recover thereon."

Under our holding with reference to Chapter 14, plaintiff's summary judgment may not be supported by the implied holdings of the trial court in sustaining grounds four, five, and six of plaintiff's supplemental motion for summary judgment. The points of error of the defendants challenging the summary judgment, insofar as such judgment rests upon violations of Chapter 14, are sustained.

Plaintiff's first complaint was that the contract violated *§ 706(8)* by failing clearly and conspicuously to disclose the amount charged for mechanical breakdown insurance. If any recovery is based upon this alleged violation, it must be set aside and we now do so by sustaining point one.

The contract was executed on July 15, 1976, at a time when the statute had no requirements relating to mechanical breakdown insurance. It was not until an act adopted by the 65th Legislature in 1977 became effective was there any language relating to mechanical breakdown insurance.[4]

Plaintiff does not attempt to defend the application of the penalty in an amended statute to a contract executed before the penalty statute was enacted. To do so would contravene not only the *Tex. Const. art. I, § 16*, but also the rule that statutes are ordinarily designed to operate prospectively and not retroactively. See, e.g., *Texas Water Rights Commission* v. *Wright*, 464 S.W.2d 642, 648-649 (Tex. 1971); *State* v. *Humble Oil & Refining Co.*, 141 Tex. 40, 169 S.W.2d 707, 708-709 (1943).

The statute is one imposing a penalty and must be strictly construed. *Hight* v. *Jim Bass Ford, Inc.*, 552 S.W.2d 490, 491 (Tex. Civ. App. — Austin 1977, writ ref'd n.r.e.). We sustain defendants' point one and deny plaintiff any recovery under *§ 706(8)* as adopted in 1977. Such

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[4] Acts 1977, 65th Leg., p. 1355, ch. 536, effective June 15, 1977. This statute is now codified as § 7.06(9) (1971-1979 Pamp.Supp.).

holding renders moot defendants' second and third points submitted contingently upon our answer to the first point.

One of the grounds relied upon by plaintiff to sustain his recovery is a contention that paragraph nineteen of the contract was in violation of § 7.07(4).[5] The language which forms the basis of plaintiff's complaint is this:

> "Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."

Plaintiff argues that the quoted language "flies completely in he face" of *Southwestern Investment Co.* v. *Mannix*, 557 S.W.2d 755, 763 (Tex. 1977); and that a federal district judge reached a different conclusion.[6] We have given careful consideration of Mannix, since we are required to follow the rationale if it is applicable. No such requirement is imposed upon this court when we consider the federal district court opinion.

Mannix is not in point in this case. There, the contract would force the buyer to assume the cost of damage done to his home by a forcible entry or an injury which was the result of intentionally tortious conduct. The Court also noted that a breach of peace during repossession would be in violation of the Business and Commerce Code.

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[5] § 7.07(4): "No retail installment contract or retail charge agreement shall: ... (4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any *illegal act* committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle; ..." (emphasis supplied).

[6] We are referred to an unpublished opinion entitled *Gutierrez* v. *McMorris Downtown Ford, Inc.*, Civil Action No. A-77-CA-174 (W.D.Tex., May 20, 1980), attached to plaintiff's postsubmission reply brief.

We have no such result possible from the language before us. We must, in the absence of anything to the contrary, assume that the repossession would not be done in such manner as to constitute an intentional tort or a breach of the peace. The identical paragraph was considered and upheld in *Tradewinds Ford Sales, Inc.* v. *Caskey,* 600 S.W.2d 865 (Tex. Civ. App. — Eastland 1980).

A similar contention was rejected in *Martens* v. *General Motors Acceptance Corp.,* 584 S.W.2d 941 (Tex. Civ. App. — Dallas 1979, no writ). We follow *Caskey* and *Martens;* and, to the extent that *Gutierrez* may be to the contrary, decline to follow it. We sustain defendants' sixth point of error, thereby eliminating the necessity of considering its alternative seventh point challenging the constitutionality of such statute as applicable to post-repossession activities.

In our approach to defendants' eighth point of error,[7] we have given careful consideration to the actual appearance of the photocopy of the contract in question in our attempt to determine if the contract meets the requirements of the statute. After such consideration and a review of the authorities relied upon by the parties, we are of the opinion that as a matter of law the contract "clearly and conspicuously" discloses the requirement of physical damage insurance in compliance with § 7.06(3) of the Act.

The front side of the contract contains a statement in bold type headed "OPTIONAL INSURANCE", less than five inches above plaintiff's signature which plainly notified the buyer:

> "Physical Damage Insurance is required by this contract.... Buyer may choose the person through whom

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[7] Point eight: "The trial court erred in granting judgment for the appellee because, as a matter of law, the contract in question clearly and conspicuously disclosed that physical damage insurance was required."

> such insurance is to be obtained, and Buyer shall have the option of furnishing the required insurance through existing policies of insurance owned or controlled by him or obtained by him through any insurance company authorized to transact business in Texas."

This language is clear, and the requirement is conspicuous on the face of the contract. But, plaintiff cites *Smith* v. *Chapman*, 614 F2d 968, 977-978 (5th Cir. 1980), contending that the holding therein calls for a different conclusion in this case. We have given careful consideration to the cited case but do not find it to be factually analogous to the provision we have in the case at bar. We sustain defendants' point eight and no not reach the subsidiary point nine.

Finally, we come to a consideration of plaintiff's contention that he is entitled to recover because there was a violation of the Code by the collection of $7.11 which he claims to have been an overcharge of the license or registration fee. If this amount is not de minimis non curat lex,[8] it can only be recovered by reliance upon § *14.04*, a victim of the 1979 statutory repeal which we discussed earlier. Consequently, plaintiff's recovery may not be upheld by reliance upon § *7.01(f)* of the Code.

Having reviewed the record and the voluminous briefs in detail and, being of the opinion that the trial court erred in entering the judgment, we reverse and now render judgment that the plaintiff take nothing as against either of the defendants.

REVERSED and RENDERED.

CLAYTON, J., not participating.

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[8] See, e.g., *Anguiano* v. *Jim Water Homes, Inc.*, 561 S.W.2d 249, 255 (Tex.Civ.App.-San Antonio 1978, writ ref'd n.r.e.); *Thornhill* v. *Sharpstown Dodge Sales, Inc.*, 546 S.W.2d 151, 153 (Tex.Civ. App.-Beaumont 1976, no writ).

# Motion to Dismiss or Affirm

Office-Supreme Court, U.S.
FILED
OCT 20 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

# Supreme Court of the United States

October Term, 1981

No. 81-467

FORD MOTOR CREDIT COMPANY

and

YATES FORD, INC.,

*Appellants,*

v.

ARNULFO R. ZAPATA,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF TEXAS

## MOTION TO DISMISS OR AFFIRM

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## QUESTION PRESENTED

1. Can Appellants raise the affirmative defense of unconstitutionality in this Court without first having raised such defense in the trial court?

2. Did Appellants have fair notice that the Waiver Provision in the retail installment contract violated Article 7.07(4) of the Credit Code?

## TABLE OF CONTENTS

Page

Question Presented ..... i

Statement of the Case ..... 2

Introductory Statement ..... 4

I. The Waiver Provision is designed to have a chilling effect on the assertion of buyer's rights to personal property taken during repossession of a motor vehicle ..... 4

II. The Credit Code should be construed in such a way as to further its legislative purpose ..... 6

III. To hold that Article 7.07(4) is unconstitutional as applied to the Waiver Provision would encourage the kind of abusive credit practices the Credit Code was meant to discourage ..... 8

Motion to Dismiss ..... 9

I. This Court lacks jurisdiction as a result of Appellant's failure to raise the constitutional question in the trial court ..... 9

II. The federal question is insubstantial ..... 11

A. The decision of the Texas Supreme Court below does not rest solely on the application of the doctrine of trespass ab initio ..... 11

B. The holding in *Bouie v. City of Columbia* is not applicable to the case at bar ..... 12

Motion to Affirm ..... 20

I. Appellants had fair notice that the Waiver Provision violated Article 7.07(4) of the Credit Code ..... 20

II. Appellants can limit liability through use of correction letters ..... 23

Conclusion ..... 25

## INDEX TO APPENDICES

Page

Appendix A. The retail installment contract executed by Appellee, Arnulfo R. Zapata ..... 1a

Appendix B. Original Answer of Ford Motor Credit Company ..... 3a

Appendix C. First Amended Original Answer of Yates Ford, Inc. ..... 4a

Appendix D. Opinion of Judge Jack Roberts of the United States District Court for the Western District of Texas in Gutierrez v. McMorris Downtown Ford, Inc. ..... 7a

Opinion of the Beaumont Court of Civil Appeals in Ford Motor Credit Company v. Chapa ..... 15a

## INDEX OF AUTHORITIES

**Case:** Page

*American Mortg. Company v. Wyman,*
41 S.W.2d 270 (Tex. Civ. App. Austin 1931, no writ) ..... 17

*Bouie v. City of Columbia,*
378 U.S. 347 (1964) ..... 12, 13, 17, 18

*Brite v. Pfeil,*
334 S.W.2d 596 (Tex. Civ. App. – Antonio 1960, writ ref'd n.r.e.) ..... 18

*Casky v. Tradewinds Ford Sales, Inc.*,
616 S.W.2d 935 (Tex. 1981) ..... 23

*Chapman v. Miller*,
575 S.W.2d 581 (Tex. Civ. App. – Beaumont
1978, writ ref'd n.r.e.) ..... 3

*Ford Motor Credit Company v. Blocker*,
588 S.W.2d 493 (Tex. Civ. App. – El Paso 1977,
writ ref'd n.r.e.) ..... 6, 7

*Ford Motor Credit Company v. Brown*,
613 S.W.2d 521 (Tex. Civ. App. – Corpus Christi 1981 ____) .. 23

*Ford Motor Credit Company v. Byrd*,
351 So.2d 557 (Ala. 1977) ..... 8, 14

*Ford Motor Credit Company v. Chapa*,
No. 8560 (Tex. Civ. App. – Beaumont 1981, writ dism'd) ..... 23

*Ford Motor Credit v. Cole*,
503 S.W.2d 853 (Tex. Civ. App. – Dallas 1973,
writ ref'd n.r.e.) ..... 24

*Ford Motor Credit Company v. Corley*, 613 S.W.2d
519 (Tex. Civ. App. – Corpus Christi 1981 ____) ..... 23

*Ford Motor Credit Company v. Galbraith*,
619 S.W.2d 2 (Tex. Civ. App. – Houston
[1st Dist.] 1981 ____) ..... 15

*Ford Motor Credit Company v. Hitchcock*,
158 SE.2d 468 (Ga. Ct. of App. 1969) ..... 8

*Ford Motor Credit Co. v. McDaniel*,
613 S.W.2d 513 (Tex. Civ. App. –
Corpus Christi 1981, writ ref'd n.r.e.) ..... 12, 23

*Ford Motor Credit Company v. Nantz*,
516 S.W.2d 840 (Ky. Ct. App. 1974) ..... 8

*Ford Motor Credit Company v. Washington*,
575 S.W.2d 616 (Tex. Civ. App. – Austin
1978, writ ref'd n.r.e.) ..... 8, 14

*Ford Motor Credit Company v. Waters,*
272 So.2d 96 (Fla. Ct. App. 1973) ..... 8

*Franklin v. First Money, Inc.,*
427 F. Supp. 66 (E.D. La. 1976) ..... 14

*Grambo v. Loomis Cycle Sales, Inc.,* 404 F.Supp. 1073
(N.D. Ind. 1975) ..... 15

*Gutierrez v. McMorris Downtown Ford, Inc.,*
Civil Action No. A-77-CA-174 (W.D. Tex.
1980, appeal pending) ..... 23

*Jim Walter Homes, Inc. v. Gibbens,*
608 S.W.2d 706 (Tex. Civ. App. – San Antonio
1980, writ ref'd n.r.e.) ..... 25

*Martens v. Gen. Motors Acceptance,*
584 S.W.2d 941 (Tex. Civ. App. – Dallas 1979,
no writ) ..... 19-20

*Marvin v. Trout,*
199 U.S. 212 (1905) ..... 21

*McBride v. Clayton,*
166 S.W.2d 125 (Tex. Civ. App. – Austin 1931,
writ ref'd n.r.e.) ..... 18

*McGowan v. King,*
569 F.2d 845 (5th Cir. 1978) ..... 21

*Michigan v. Tyler,*
436 U.S. 499 (1978) ..... 10

*Mobile America Sales Corp. v. Rivers,*
556 S.W.2d 378 (Tex. Civ. App. – San Antonio
1977, writ ref'd n.r.e.) ..... 10

*Mourning v. Family Publications, Inc.,*
411 U.S. 356 (1973) ..... 15

*Mutual Life Ins. Co. v. McGrew,*
188 U.S. 291 (1903) ..... 10

*O.R. Mitchell Motors, Inc. v. Bell,*
528 S.W.2d 856 857-860(Tex. Civ. App. – San Antonio
1974, writ ref'd n.r.e.) ..... 6

*Papachristou v. City of Jacksonville,*
405 U.S. 156 (1972) ..... 16

*Portland Tradewinds Ford v. Lugo,*
613 S.W.2d 26 (Tex. Civ. App. – Corpus Christi 1981) ..... 3

*Simpson v. Phillips Pipe Line Company,*
603 S.W.2d 307 (Tex. Civ. App. – Beaumont
1980, writ ref'd n.r.e.) ..... 17

*Singleton v. Pennington,*
606 S.W.2d 682 (Tex. 1980) ..... 10, 16

*Southwestern Investment Company v. Mannix,*
57 S.W.2d 755 (Tex. 1977) ..... 11, 12, 16, 20, 21

*State v. Scott,*
460 S.W.2d 103 (Tex. 1970) ..... 9

*Stembridge v. Georgia,*
343 U.S. 547 (1951) ..... 10

*United States v. Hess,*
317 U.S. 537 (1943) ..... 21

*United States v. National Dairy Products Corp.,*
372 U.S. 29 (1963) ..... 16

*United States Reading Lab, Inc. v. Brockett,*
551 S.W.2d 531 (Tex. Civ. App. – Austin 1977,
writ ref'd n.r.e.) ..... 10

*Varela v. Wells Fargo Bank,*
93 Cal. Rptr. 428 (Cal. Ct. App. 1971) ..... 12

*Zapata v. Ford Motor Credit Co.,*
615 S.W.2d 198 (Tex. 1981) ..... 6, 11, 12

**Statutes**

Declaration of Legislative Intent, 15 Vernon's Ann. Civ. Stat. pp. 1-2 (1971) ..... 21

Tex. Bus. & Comm. Code Ann. § 17.41 et. seq ..... 16

Tex. Laws 1977, ch. 111 § 1 at 228 ..... 23

Tex. Rev. Civ. Stat. Ann., Art. 5069–7.06(3) ..... 3

Tex. Rev. Civ. Stat. Ann., Art. 5069–7.07(4) ..... *passim*

Tex. Rev. Civ. Stat. Ann., Art. 5069–7.07(7) ..... 18, 19

Texas Rules of Civil Procedure, Rule 94 ..... 9

IN THE

# Supreme Court of the United States

October Term, 1981

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FORD MOTOR CREDIT COMPANY

and

YATES FORD, INC.,

*Appellants,*

v.

ARNULFO R. ZAPATA,

*Appellee.*

---

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF TEXAS

---

## MOTION TO DISMISS OR AFFIRM

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TO THE SUPREME COURT OF THE UNITED STATES:

Appellee moves this Court to dismiss the appeal herein or to affirm the judgment of the Supreme Court of Texas on the ground that this Court lacks jurisdiction and that all of the questions raised are so unsubstantial as not to warrant further argument.

## STATEMENT OF THE CASE

On July 15, 1976, Arnulfo R. Zapata ("Zapata") purchased a new pick-up truck from Yates Ford, Inc. of Alice, Texas. The motor vehicle was financed pursuant to a retail installment contract ("CONTRACT"). The CONTRACT was assigned on July 15, 1976, to Appellant Ford Motor Credit Company (FMCC) by Yates Ford, Inc., ("Yates Ford"). The form contract was supplied to Yates Ford by FMCC.

In September 1978, Appellee filed suit against Appellants for violations of the Texas Consumer Credit Code ("Credit Code"). The violations alleged related to certain credit disclosure requirements and to a section of the Credit Code which prohibits contracts from waiving the buyer's rights of action for illegal conduct which occurs in connection with the repossession of a motor vehicle.

The trial court entered a partial summary judgment holding that the contract did violate the Credit Code and the trial court entered a final judgment in Appellee's favor after a hearing on the issue of attorney's fees.

At the trial court, FMCC answered Appellee's petition by filing a general denial. (Appendix B). Appellant Yates Ford answered without raising any defense questioning the constitutionality of any portion of the Credit Code. (Appendix C.).

The Beaumont Court of Civil Appeals[1] reversed the judgment of the trial court and rendered a judgment for Appellants. Appellant FMCC in its brief to the Beaumont court raised for the first time its claim that Article 7.07(4) is unconstitutionally vague if applied to post-repossession

[1]The Beaumont Court is just one of thirteen courts of civil appeals located in Texas.

activities.[2] Appellee responded to this contention by arguing that Appellant waived its unconstitutionality defense.[3] The Beaumont court did not consider the question of the constitutionality of Article 7.07(4).

The Texas Supreme Court granted Appellee's Application for Writ of Error. It granted error on two points. First, to consider whether paragraph nineteen (19) of the CONTRACT violated Article 7.07(4) of the Credit Code and second, whether the CONTRACT "clearly and conspicuously" disclosed, as mandated by Article 7.06(3) of the Credit Code, that the buyer was required to purchase physical damage insurance. The Court held that the Waiver Provision did violate Article 7.07(4) of the Credit Code and therefore found it unnecessary to reach the other question involving the insurance disclosure requirement.[4]

The Texas Supreme Court did not rule on the question of the constitutionality of Article 7.07(4). It should not be presumed to have ruled that Article 7.07(4) was constitutional since that point was not properly preserved.

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[2]Jurisdictional Statement at p. 5.

[3]The following Counterpoint was raised by Appellee in response to Appellant's Point of Error asserting the defense of unconstitutionality.

COUNTERPOINT 3

Appellant FMCC failed to raise the "vagueness" constitutional question in the trial court and Appellant has waived this affirmative defense; alternatively, Article 5069-7.07(4) is not unconstitutionally vague.

[4]Under the Credit Code a single violation is sufficient to impose liability. *Chapman v. Miller*, 575 S.W.2nd 581, 583 (Tex.Civ.App. – Beaumont, 1978, writ ref'd n.r.e.) A recently decided Texas case held that the FMCC form retail installment contract does violate the insurance disclosure requirement asserted by Appellee. *Portland Tradewinds Ford v. Lugo*, 613 S.W.2nd 26 (Tex.Civ.App. – Corpus Christi 1981 –).

## INTRODUCTORY STATEMENT

### I. THE WAIVER PROVISION IS DESIGNED TO HAVE A CHILLING EFFECT ON THE ASSERTION OF BUYER'S RIGHTS TO PERSONAL PROPERTY TAKEN DURING REPOSSESSION OF A MOTOR VEHICLE.

The Texas Supreme Court held that the Waiver Provision[5] in the CONTRACT violated Article 7.07(4) of the Credit Code. Article 7.07 prohibits contractual provisions in retail installment contracts which may encourage abusive credit practices or may deter or inhibit buyers from asserting rights which they have under statute or common law. Subsection 4 of Article 7.07 is aimed at eliminating the waiver of rights which can be asserted against creditors who engage in illegal conduct in connection with harsh or unreasonable collection activity. A repossession is just part of the collection process.

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[5]The Waiver Provision is on the reverse side of the CONTRACT among the fine print in the middle of paragraph 19. (See Appendix A)

WAIVER PROVISION

Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession.

[6]Article 5069-7.07(4) provides:

No retail installment contract or retail charge shall:

(4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle.

The Waiver Provision consists of two clauses, a bailor-bailee clause and a forfeiture clause.[7] The forfeiture clause is specially designed to have a chilling effect on the assertion of buyer's rights to personal property located in the motor vehicle at the time of repossession. The clause is hidden on the reverse side of the contract in the same size type as the rest of the surrounding boilerplate. There is nothing that would call attention to the clause. The only time that buyers are likely to become aware of the clause is when they make demand for their personal goods. At the time, the creditor, collection agency or the repossessor can tell the buyer that any right to the personal items has been lost because no claim was asserted within 24 hours by certified mail.

The requirement to notify the "Seller" within 24 hours by certified mail is especially confusing. What buyer would think to notify the seller when the retail installment contract has been assigned? What buyer would know to send the notice by CERTIFIED MAIL? What buyer could get the notice to the "Seller" within 24 hours by certified mail if the repossession occurred on a Saturday or on an evening?

It does not take any brain trust to figure out the effect of the 24-hour certified mail requirement. This provision gives the unscrupulous creditor an apparent contractual

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[7]The two clauses of the Waiver Provision are set forth as follows:

Any personalty in or attached to the Property when repossessed may be held by Seller without liability

and

Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession.

right to assert a claim to the buyer's personal property in which the creditor has no security interest, regardless of the creditor's coming into possession of the property legally or illegally.

## II. THE CREDIT CODE SHOULD BE CONSTRUED IN SUCH A WAY AS TO FURTHER ITS LEGISLATIVE PURPOSE.

Appellant in their brief argue strenously that the requirements and prohibitions of the Credit Code should be strictly construed.[8] The Texas Supreme Court has said that the recovery under the Credit Code is penal in nature. *Zapata v. Ford Motor Credit Co.*, 615 S.W.2d 198, 199 (Tex. 1981). The mere fact that a statute to some extent is penal in nature does not mean that it should be strictly construed. *O.R. Mitchell Motors, Inc. v. Bell*, 528 S.W.2d 856, 857-860 (Tex.Civ.App. – San Antonio 1974, writ ref'd n.r.e.).[9] The cardinal rule of judicial construction is that courts are to liberally construe statutes to carry out the intention of the Legislature. TEX.REV.CIV.STAT.ANN. art. 10(6). Appellant FMCC's argument for strict construction was rejected in *Ford Motor Credit Company v. Blocker*, 558 S.W.2d 493 (Tex.Civ.App. – El Paso 1977, writ ref'd n.r.e.).

> "Chapters 7 and 8 of the Texas Consumer Code were designed to protect buyers by preventing abusive and deceptive trade practices by both sellers and creditors of personal property and motor vehicles in ordinary credit transactions.

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[8]Jurisdictional Statement 18.

[9]*O.R. Mitchell* provides an excellent discussion of the principles of statutory construction to be applied to the Credit Code at 859-860.

> To effect that purpose, the role of strict construction applicable in the past to punitive statutes has been subordinated to the cardinal rule of construction that the statutes are to be liberally construed to effect the intention of the Legislature." *Blocker* at 498.

In enacting the Credit Code in 1967, The Texas Legislature set forth the purpose of the legislation in detail.[10] The Credit Code's primary thrust was to protect

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[10]The purpose of the legislation was set forth in pertinent part in the Declaration of Legislative Intent, as follows:

> (1) Many citizens of our State are being victimized and abused in various types or credit and cash transactions. These practices impose a great hardship upon the people of our State . . .
>
> (3) Credit abuses now existing in our State stem from the fact that many types of credit transactions are not now subject to effective public regulation and control and the penalties imposed for usury do not provide effective or workable safeguards in this vital area of economic activity.
>
> (4) Such abuses are especially prevalent in the area of consumer transactions both cash and credit. Unscrupulous operators, lenders and vendors, many of whom are transient to our State, are presently engaged in many abusive and deceptive practices in the conduct of their businesses. These unregulated practices bring great social and economic hardship to many citizens of our State. They impose intolerable burdens on those segments of our society which can least afford to bear them – the uneducated, the unsophisticated, the poor and the elderly . . .
>
> (6) It is the intent of the Legislature in enacting this revision of Title 79 of the Revised Civil Statutes of Texas, 1025, to protect the citizens of Texas from abusive and deceptive practices now being perpetrated by unscrupulous lenders and vendors in both cash and credit consumer transactions . . . and thus serve the public interest." 15 TEX.CIV.STAT.ANN. at pp. 1-2.

The Credit Code's primary thrust was to protect "the uneducated, the unsophisticated, the poor and the elderly" against abusive credit practices by unscrupulous lenders and vendors. It is with this understanding in mind in which Article 7.07(4) is to be tested to determine if it gave fair notice to Appellants that the Waiver Provision fell within the ambit of the prohibition.

## III. TO HOLD THAT ARTICLE 7.07(4) IS UNCONSTITUTIONAL AS APPLIED TO THE WAIVER PROVISION WOULD ENCOURAGE THE KIND OF ABUSIVE CREDIT PRACTICES THE CREDIT CODE WAS MEANT TO DISCOURAGE.

Assuming arguendo that Appellants would not engage in abusive credit practices,[11] the decision about whether the Waiver Provision violates Article 7.07(4) must be judged against the use of the Waiver Provision by an unscrupulous creditor. With this idea in mind it is logical to assume that even the original taking of the motor vehicle was unlawful. In this situation, the Waiver Provision could operate to have a chilling effect on the assertion of the buyer's rights to his personal property located in the motor vehicle. In this instance the wrongful conversion of the personalty takes place simultaneously with the repossession of the motor vehicle.

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[11]There is, on the contrary, some evidence of Appellant FMCC engaging in abusive credit practices. *Ford Motor Credit Company v. Byrd*, 35 So.2d 557 (Ala. 1977) obtaining a vehicle by trickery; *Ford Motor Credit Company v. Washington*, 575 S.W.2d 616 (Tex.Civ.App. – Austin 1978, writ ref'd n.r.e.) wrongful repossession of a vehicle; *Ford Motor Credit Company v. Waters*, 272 So. 2d 96 (Fla Ct. App. 1973) after repossession lost buyer's personal property; *Ford Motor Credit Company v. Nantz*, 516 S.W. 2d 840 (Ky Ct. of App. 1974) wrongful repossession of a motor vehicle; *Ford Motor Credit Company v. Hitchcock*, 158 S.E. 2d 468 (Ga. Ct. of App. 1967) wrongful repossesion of a motor vehicle.

To hold Article 7.07(4) unconstitutional as applied to the Waiver Provision would encourage every sharp operator to draft a contract which has a clause which has some unattainable hurdle to be performed within short time *after* repossession of the motor vehicle and if not performed then the buyer would lose not only all rights to personalty but to the motor vehicle itself or to the proceeds of the motor vehicle. Undoubtedly, such a holding would do great damage to the Credit Code and its primary purpose of protecting "the uneducated, the unsophisticated, the poor and the elderly" against abusive credit practices.

## MOTION TO DISMISS

### I. THIS COURT LACKS JURISDICTION AS A RESULT OF APPELLANTS FAILURE TO RAISE CONSTITUTIONAL QUESTION IN THE TRIAL COURT

The questions presented by Appellants in their Jurisdictional Statement relate to whether Article 7.07(4) gave them "fair notice" under the Due Process Clause that the Waiver Provision violated the statute. Appellants failed to raise the defense of unconstitutionality of the statute in the trial court. A defense of unconstitutionality is an affirmative defense in Texas. *State v. Scott,* 460 S.W.2d 103, 107 (Tex. 1970), cert. denied 402 U.S. 1012 (1971). Failure to plead an affirmative defense in Texas results in a waiver of the defense. TEX.R.CIV.P. Rule 94.

> "Although Rule 94, Texas Rules of Civil Procedure, enumerates at least nineteen specific defenses which must be affirmatively pleaded, the Rule also includes any other matter constituting an avoidance or affirmative defense. Avoidance on the basis of a statute being un-

> constitutional falls squarely within the defenses required to be pleaded affirmatively." *United States Reading Lab, Inc. v. Brockette,* 551 S.W. 2d 531 (TEX.CIV. APP. – Austin 1977, writ ref'd n.r.e.)

The Texas Supreme Court did make an exception to the pleading of a defense of unconstitutionality of a statute where plaintiff's petition did not mention the statute or request any relief under it *Singleton v. Pennington,* 606 S.W.2d 682, 688 (Tex. 1980).[12] In the case at bar, the *Singleton* case is not on point because Appellee did plead for relief under Article 7.07(4) as reflected in the opinions below.[13]

The United States Supreme Court is without jurisdiction where the Appellant has failed to present a federal question in compliance with state procedure. *Mutual Life Ins. Co. v. McGrew,* 188 U.S. 291, 308-309 (1903); *Michigan v. Tyler,* 436 U.S. 499, 512 (1978). Where the highest court of the state's opinion "might" have rested on a non-Federal ground, due to the failure to properly raise a constitutional question, then the United States Supreme Court is without jurisdiction to review the case. *Stembridge v. Georgia,* 343 U.S. 547, 548 (1951).

Since Appellant presented the unconstitutionality defense in the Beaumont Court of Civil Appeals and in their Reply Brief in the Texas Supreme Court, prior to the

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[12]The Texas Supreme Court merely adopted the Dallas Court of Civil Appeals ruling that if the statute is not plead by the plaintiff then the defendant does not need to plead the unconstitutionality of the statute.

[13]See *Mobile America Sales Corp. v. Rivers,* 556 S.W.2d 378 (Tex.Civ.App. – San Antonio 1977, writ ref'd n.r.e.) where the defendant waived the unconstitutionality defense in a Credit Code case.

issuance of the Texas Supreme Court's opinion below, there is no validity to the argument that the Due Process Clause defense could not have been raised in the trial court. Their failure to plead the affirmative defense of unconstitutionality under the Due Process Clause should deprive this Court of jurisdiction.

## I. THE FEDERAL QUESTION IS INSUBSTANTIAL

### A. The decision of the Texas Supreme Court below does not rest solely on the application of the doctrine of trespass ab initio.

In reading the Texas Supreme Court opinion below it is important to read the opinion with the understanding that the court was in no way repudiating its opinion in *Southwestern Investment Company v. Mannix,* 557 S.W.2d 755 (Tex 1977). The *Mannix* decision dealt with an identical statutory prohibition against waiving claims for illegal acts which occur in the collection of payments or in the repossession of goods. In *Mannix,* the court tested the waiver provision against illegal conduct which results in damage to real property in the removal of the buyer's goods. In *Zapata,* the court in its hypothetical assumed that the taking of the motor vehicle was lawful but the detention of the goods located in the motor vehicle was unlawful.[14] *Zapata, supra* at 202.

The Court was merely pointing out that even in the situation where the automobile was rightfully repossessed, Article 7.07(4) is violated by use of the doctrine. Certainly

[14]In discussing the doctrine of trespass ab initio, the Court in its hypothetical assumed "a wrongful detention of unsecured personalty 24 hours after repossession, *by one in lawful possession,* is a trespass from the time of repossession". (emphasis added).

in the situation where the vehicle was *wrongly* repossessed with personal goods in the automobile at the time of repossession there is no need to employ the doctrine to find a violation of Article 7.07(4) since the illegal activity involved the repossession itself.

In harmonizing *Mannix* and *Zapata* there is no need to read the *Zapata* opinion so narrowly such that one should test the legality of the Waiver Provision only against a lawful taking of the motor vehicle. Certainly, when *Mannix* and *Zapata* are harmonized it is clear that the court would hold that the Waiver Provision violated the statute when the initial repossession was wrongful. In this situation, the conversion or trespass takes place at the very moment of taking the vehicle.[15] Would the Waiver Provision be operative where the initial taking is wrongful? Yes.[16] A buyer loses a right to make "ANY CLAIM" (emphasis added) to personalty if not done within 24 hours by certified mail. The *Zapata* opinion, then, should be read to strike down the Waiver Provision whether the initial taking is lawful or unlawful. With this understanding the holding in *Zapata* is not limited to fact patterns where the trespass ab initio doctrine is employed.

**B. The holding in Bouie v. City of Columbia, is not applicable to the case at bar.**

Appellants contend that the Texas Supreme Court opinion is in conflict with *Bouie v. City of Columbia,* 378

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[15]When an automobile is taken wrongfully, the secured party does not have the right even temporarily to any of the personal property in the automobile. *Varela v. Wells Fargo Bank,* 93 Cal. Rptr. 428, 432 (Cal.Ct. of App. 1971).

[16]In *Ford Motor Credit Co. v. McDaniel,* 613 S.W.2d 513, 516-517 (Tex.Civ.App. – Corpus Christi 1981) the Waiver Provision was held to waive buyer's rights resulting from an illegal act during repossession.

U.S. 347 (1964). A close reading of *Bouie* would clearly show that it is not controlling on the case at bar.

*Bouie* dealt with a South Carolina criminal trespass statute which prohibited "entry upon lands of another . . . after notice from the owner or tenant prohibiting such entry." The defendants entered a lunch counter as part of a "sit-in" demonstration.[17] They did not receive notice not to enter the lunch counter area. The convictions of the defendants were upheld by the South Carolina Supreme Court under the theory that defendants were guilty of criminal trespass when they were asked to leave the lunch counter and failed to do so.

The Court held that defendants were being punished for conduct which was outside the scope of that statute as a result of an unforeseen interpretation of the statute by the South Carolina Supreme Court.

> "Petitioners contend, however, that by applying such a construction of the statute to affirm their convictions in this case, the State has punished them for conduct that was not criminal at the time committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits. We agree with this contention." *Bouie* at 350.

Appellants try to get this Court to focus most of its attention on whether Appellants could reasonably foresee that the Texas Supreme Court would invoke the doctrine

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[17] *Bouie* was decided before the Civil Rights Act of 1964 went into effect prohibiting discrimination on the basis of race in public accommodations. See Justice Black's dissent at 363-367.

of trespass ab initio.[18] This is a rabbit trial. It is irrelevant, constitutionally speaking, what doctrine the Texas Supreme Court invoked to establish liability so long as Appellants had fair notice that the Waiver Provision was in violation of Article 7.07(4).[19]

Does the Credit Code provide fair notice that the Waiver Provision violates Article 7.07(4)? The answer is surely "yes."

For the sake of argument, let us construe Article 7.07(4) in the most narrow sense possible. The most narrow construction would prohibit the waiver of rights resulting only from those illegal acts which occur during the physical taking of a motor vehicle. Even with this construction, the Waiver Provision violates the prohibition.[20]

Suppose a buyer for several months had been making late payments on the purchase of a used car. Suppose also, that the used car dealer who financed the deal agreed to waive acceleration of the note. The used car breaks down as a result of mechanical failure. The buyer and dealer get into a dispute about who is liable for the repairs. The dealer, although the buyer is not in default, is upset and goes to the buyer's home at 3:00 a.m. and repossesses the used car. In the trunk of the used car are located the tools of the buyer's trade. The buyer is a carpenter. The

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[18]Jurisdictional Statement at 20-23.

[19]Judge Rubin in *Franklin v. First Money, Inc.*, 427 F.Supp. 66, 68-69 (E.D.La. 1976) provides an excellent discussion of the imperative of first reviewing the statute itself to determine if liability was reasonably foreseeable.

[20]See *Ford Motor Credit Company v. Washington*, 573 S.W.2d 616 (Tex.Civ.App.—— Austin 1978, writ ref'd n.r.e.) where used car was wrongfully repossessed at 3:00 a.m. and *Ford Motor Credit Company v. Byrd*, 351 So. 2d 557 (Ala. 1977) where used car was repossessed by trickery.

buyer goes to the dealer and orally demands the return of the motor vehicle and the tools. The dealer refuses to give them up and tells the buyer that the note has been accelerated. The buyer spends the next day trying to raise the cash to pay off the note but is unable to raise the money. The next day, two days after the taking of the used car, the buyer tells the dealer he cannot pay off the note and he wants both the car and his tools back. The dealer refuses claiming that he was in default on the note (even though the default was waived) and as to the tools he will not give those back because the note on the reverse side, in the fine print, contained the Waiver Provision, requiring a written demand for the tools within 24 hours by certified mail.

In this hypothetical, it is easy to see how the Waiver Provision would operate to have a chilling effect on the assertion of buyer's rights for conversion of the tools. The wrongful conversion of the tools took place at the moment the motor vehicle was being wrongfully taken.[21] Even under the most narrow construction of Article 7.07(4) the Waiver Provision violates the prohibition. Appellants had sufficient warning that the Waiver Provision fell within the ambit of the prohibition for due process purposes.[22]

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[21]Appellants would argue that they would never engage in such conduct. See Jurisdictional Statement, Appendix G, Affidavit of Embrey Hulsey. (The Hulsey affidavit contains only self-serving conclusions which were insufficient to raise a fact issue even on a motion for summary judgment. See *Ford Motor Credit Company v. Galbraith*, 619 S.W.2d 2 (Tex.Civ.App. – Houston [1st Dist.] 1981 _____). The fact that creditors who would not act unfairly or abusively must comply with the law does not affect its validity. *Mourning v. Family Publications, Inc.*, 411 U.S. 356, 373-374 (1973).

[22]See *Grambo v. Loomis Cycle Sales, Inc.*, 404 F.Supp. 1073, 1075, (N.D. Ind. 1975) where statute was challenged on vagueness grounds by a motorcycle dealer. The statute required posting of odometer mileage on left door frame. *Grambo* contains an excellent discussion of constitutional principles to be applied to a statute enacted to promote a public purpose.

Recently, the Texas Deceptive Trade Practices Act has come under constitutional attack on vagueness grounds. *Singleton v. Pennington,* 606 S.W. 2d 682 (Tex 1980). Several of the guideposts used by the court in that case in deciding the constitutionality question should be helpful in the case at bar.[23]

> "We first note that in the field of regulatory statutes governing business activity, greater leeway is allowed in applying the fair notice test. *Papachristou v. City of Jacksonville* 405 U.S. 156, 162,92S.Ct.839,31 L.Ed.2d 110(1972) . . . . Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. *United States v. National Dairy Products Corp.,* 372 U.S. 29, 33. 83 S.Ct. 594, 9L.Ed. 2d 561(1963)". *Singleton* at 689.

Article 7.07(4) should not be construed narrowly. Attention should not be focused on just an isolated position of the Credit Code. *Mannix* at 761. The purpose of subsection 4 is best determined by examining the Declaration of Legislative Intent, set forth above, and from the general thrust of Article 7.07. After reading each of the subsections of Article 7.07, it becomes clear that this article is meant to deter abusive collection practices. With that general purpose in mind, the language "in the repossession" becomes much more understandable.

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[23]The Texas Deceptive Trade Practices Act, TEX.BUS&COMM.CODE ANN. § 17.41 *et. seq.* like the Credit Code is aimed at deterring certain abusive and deceptive business practices. The Act like the Credit Code is enforced primarily by resort to a civil penalty.

Subsection 4 is meant to have a prophylactic effect on illegal conduct which occurs in connection with collection activity and more specifically with the repossession process. Further study makes it obvious that the prohibition relates not just to illegal acts which occur while the creditor is taking the car out of the buyer's driveway into the street. To deter abusive collections practices, the "in the repossession" language applies to any illegal conduct of the creditor while the creditor has custody of the motor vehicle for the purpose of satisfying a debt or extracting money from the buyer.

Besides the fact the statute gives appellants fair notice there are other reasons why *Bouie* is not in point. In 95 years of decisions in South Carolina, "notice before entry" was interpreted to be an element of the offense in proving criminal trespass.[24] By way of contrast, in Texas at the time the Credit Code was enacted in 1967, the doctrine of traspass ab initio was alive and well.[25]

> "The doctrine of trespass ab intio is followed in Texas, and though the original possession of the calf was a lawful possession, his unlawful detention of the animal after demand made it an

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[24]*Bouie* at 356-357. The offense could not be proved by simply asking someone to leave.

[25]Not until *Simpson v. Phillips Pipe Line Company*, 603 S.W.2d 307 (Tex. Civ. App. – Beaumont 1980, writ ref'd n.r.e.) decided in 1980 – thirteen years after the enactment of the Credit Code – was there any discussion by a Texas court of repudiation of the doctrine of trespass ab initio. The Texas Supreme Court prior to its decision in *Zapata* had never repudiated the doctrine. See *American Mortg. Company v. Wyman*, 41 S.W.2d 270, 273 (Tex.Civ. App. – Austin 1931, no writ).

> unlawful trespass from the beginning." *Brite v. Pfeil,* 334 S.W.2d 596 (Tex.Civ.App. – San Antonio 1960, writ ref'd n.r.e.).

In construing a statute, courts are directed to existing decisions of the state courts in deciding what the legislature meant when the law was passed, *McBride v. Clayton,* 166 S.W.2d 125, 128 (Tex.Civ.App. – Austin 1931, writ ref'd n.r.e.). To be consistent with this rule of statutory construction, it was appropriate for the Texas Supreme Court to employ the doctrine of trespass ab initio.

Prior to the Texas Supreme Court's decision below, other Texas courts, without application of the doctrine, had ruled that the Waiver Provision violated Article 7.07(4).[26]

In *Bouie* it was pointed out that the South Carolina legislature had added a new element to the offense of criminal trespass after the convictions of the defendants.[27] The amendment provided that the offense of criminal trespass could occur if a person failed to comply with the owner's request to leave. This Court took that amendment to be further confirmation of the fact that "notice to leave" had previously not been sufficient to establish an offense under the statute.

In 1979, the Texas Legislature added subsection(7) to Article 7.07 of the Credit Code. It prohibited an authorization to retain or dispose of personal property located in a motor vehicle at the time of repossession unless the buyer was sent a written notice indicating where

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[26]These decisions will be discussed under the Motion to Affirm.

[27]id. at 361.

the buyer may come and claim such property. If the buyer failed to claim the items within thirty days after the notice, then the seller or holder could dispose of the items.

The 1979 Credit Code amendment in no way should be interpreted as indicating that the Waiver Provision did not run afoul of subsection 4.

Appellants argue that subsection (7) means that subsection (4) was not meant to cover illegal acts occurring after the creditor took custody of the motor vehicle. Assuming that is true, that still does not mean that the Waiver Provision did not violate subsection(4) even when "in the repossession" is limited to that time period when the creditor is taking custody of the motor vehicle. As pointed out earlier, if the initial taking of the motor vehicle is wrongful, then, the taking of the personal property located in the motor vehicle is wrongful. The initial unlawful event occurs at the very moment the creditor takes custody of the motor vehicle. The Waiver Provision on its face denies claims to personal property, if no 24 hour notice is made, which were wrongfully converted at the very moment the creditor took custody of the motor vehicle.

The thrust of subsection 7 is to provide some guidance to involuntary bailees. The amendment allows creditors to dispose of personal property if no claim is made within thirty days after sending a notice to the buyer. Without this provision, creditors would be in a twilight zone as far as knowing how long to hold on to personal property.

At the time of the 1979 amendment, creditors who were doing nothing more than spelling out their rights as involuntary bailees were finding themselves in violation of subsection (4). *Martens v. Gen. Motors Acceptance*, 584

S.W.2d 941 (Tex.Civ.App. – Dallas 1979, no writ).[28] The subsection (7) amendment, rather than narrowing the definition of "in the repossession", was acknowledging the fact that creditor-involuntary bailees were within the application of subsection (4).

## MOTION TO AFFIRM

### I. APPELLANTS HAD FAIR NOTICE THAT THE WAIVER PROVISION VIOLATED ARTICLE 7.07(4) OF THE CREDIT CODE

In *Mannix*, there was a retail installment contract assigned to a lender which involved the purchase of stereo equipment. The contract had a provision in which the buyer waived his right to sue for the "cost of repairs, if any, of any physical injury to the real estate caused by such removal." The Texas Supreme Court held that this provision violated Article 6.05(4). *Mannix* at 763.

How could the removal of stereo equipment injure real property? There was no evidence that any of the equipment was affixed or attached to real property! The obvious answer is that as to this particular buyer, in all likelihood there was no potential harm which he might suffer. The Court felt that in his role of private attorney-general that this was just the kind of clause that might in some instances have a chilling effect on some consumers

[28]The *Martens* decision was handed down on July 29, 1979, several months after the Texas Legislature had adjourned. Trial courts had been holding that a mere description of the bailor-bailee relationship was in violation of subsection (4). The Texas Supreme Court acknowledged that if the CONTRACT had merely described the bailor-bailee relationship it would not have been in violation of Article 7.07(4). *Zapata* at 201.

making claims for damage to real property.[29] It is obvious on any reading of *Mannix* that the Supreme Court did not strictly construe the Credit Code but gave the Code a broad reading in light or its remedial purpose as set forth in the Declaration of Legislative Intent of Article 5069.

> "The inclusion of this prohibited item in the contract which waived Mannix' right of action for certain illegal acts which *might* be committed in the repossession of goods subjected SIC to the penalties provided for in Article 5069-8.01." (emphasis added) *Mannix* at p. 764.

The CONTRACT waived the right to personal property unless "written demand by certified mail is made upon the Seller within 24 hours after repossession." For the group of individuals the Credit Code is designed to protect, the "uneducated, the poor and the elderly," this condition will never be satisfied. A few of the common sense reasons why this condition cannot be met are set forth as follows:

1. The probability is unlikely any of these individuals will have read and remembered this provision on the reverse of the CONTRACT. It is buried among legal jargon in a location designed to indicate it is unimportant.

2. Demand is to be made on the "Seller" but

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[29]Statutes which have been enforced by a private attorney-general have been in existence in England for hundreds of years and in this country since "the foundation of our Government." *Marvin v. Trout* 199 U.S. 212,222 (1905). Statutes which provide for enforcement by private attorney-generals are generally thought to be remedial and not punitive in nature. *United States v. Hess*, 317 U.S. 357, 549 (1943); *McGowan v. King, Inc.*, 569 F.2d 845, 848 (5th Cir. 1978).

the "Seller" is the secured party once the CONTRACT has been assigned. Is it likely that the "poor, uneducated and the elderly" are going to understand this distinction?

3. The buyer is to make demand for "personalty." What does the term "personalty" mean? It is likely they would understand the term?

4. "Written demand" for "personalty" must be made by certified mail in 24 hours. If written demand means an itemized list of personal items in the automobile at the time of repossession, is it likely that they will understand that they must produce such a list?

5. The written demand to the "Seller" for personalty must be made within 24 hours by CERTIFIED MAIL. Is it likely that they will have ever sent something by certified mail?

6. The written demand by CERTIFIED MAIL must be received by the "Seller" within 24 HOURS. Is it likely that if a vehicle was repossessed on a Tuesday evening that the U.S. Postal Service would deliver the letter to the Seller with the Wednesday mail delivery?

After reviewing all the hoops which the "poor, the uneducated and the elderly" must jump through to be able to satisfy the "condition", there is only one conclusion whch can be drawn: that the "condition" is merely legal jargon which is surplusage and should not be read as part of the Waiver Provision in that it has no operative effect and was not designated to be utilized by the individuals the Credit Code is designed to protect.

The intent of the Waiver Provision becomes crystal clear once this surplusage is struck through:

> ANY PERSONALTY IN OR ATTACHED TO THE PROPERTY WHEN REPOSSESSED MAY BE HELD BY SELLER WITHOUT LIABILITY AND BUYER SHALL BE DEEMED TO HAVE WAIVED ANY CLAIM THERETO ~~UNLESS WRITTEN DEMAND BY CERTIFIED MAIL IS MADE UPON SELLER WITHIN 24 HOURS AFTER REPOSSESSION.~~

A common sense reading of the Waiver Provision should have given Appellants ample notice that it would not escape the prohibition of subsection (4).[30]

## II. APPELLANTS CAN LIMIT LIABILITY THROUGH USE OF CORRECTION LETTERS.

The 1977 Amendments to the Credit Code provided creditors with the opportunity to correct disclosure violations which might appear in retail installment contracts. Tex. Laws 1977, ch. 111 § 1 at 228. A creditor can avoid

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[30]All of the following cases held that the Waiver Provision violated subsection (4). *Casky v. Tradewinds Ford Sales, Inc.*, 616 S.W.2d 935 (Tex. 1981); *Ford Motor Credit Company v. Corley*, 613 S.W.2d 519, 520 (Tex. Civ. App. – Corpus Christi 1981 _____) *Ford Motor Credit Company v. Brown*, 613 S.W.2d 521, 522 (Tex. Civ. App. – Corpus Christi 1981 _____); *Ford Motor Credit Company v. McDaniel*, 613 S.W.2d 513 (Tex. Civ. App.____Corpus Christi 1981, writ ref'd n.r.e.); *Ford Motor Credit Company v. Chapa*, No. 8560 (Tex. Civ. App. – Beaumont 1981, writ dism'd); *Gutierrez v. McMorris Downtown Ford, Inc.*, Civil Action No. A-77-CA-174 (W.D. Tex. 1980, appeal pending). *Gutierrez and Chapa* are attached as Appendix D.

any liability if a correction notice is sent to the buyer ("obligor") within 60 days after discovering a violation.[31]

After reviewing *Ford Motor Credit v. Cole*, 503 S.W.2d 853 (Tex.Civ.App. – Dallas 1973, writ ref'd n.r.e.), Appellants could easily see how a court could construe the "waiver" sentence as attempting to waive the illegal act of converting personalty. Appellants chose not to employ the correction mechanism established by the 1977 Amendments. Appellants have willfully and intentionally chosen not to use the correction mechanism to avoid liability. They should not now be heard to complain of liability which is imposed.

Recently, Jim Walter Homes avoided any liability for Credit Code violations for thousands of contracts by utilizing the correction mechanism.

> "Clearly, the purpose of the cure statute is to allow creditors to cure past violations and thereby relieve themselves of strict penalties. It is illogical to assume that the Legislature intended to provide for a cure or remedy that is impossible to perform, that is, change a 'time price differential' transaction into an 'interest' transaction

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[31]Article 8.01(c)(1) of the Credit Code sets forth the authority for the correction mechanism, as follows:

> "A person has no liability to an obligor for a violation of this Subtitle or of Chapter 14 of this Title if within 60 days after having actually discovered such violation such person corrects such violation as to such obligor by performing the required duty or act or by refunding any amount in excess of that authorized by law; provided, however, that such person gives written notice to such obligor of such violation prior to such obligor having given written notice of or having filed an action alleging such violation of this Subtitle or of Chapter 14 of this Title."

after the contract has been entered into and executed. The clear purpose and intent of Article 8.01(c) is to authorize and encourage ex post facto actions. Appellant's cure actions and procedure fully and concisely complied with the express wording and policy of the statute involved." *Jim Walter Homes, Inc. v. Gibbens*, 608 S.W.2d (Tex.Civ.App. – San Antonio 1980, writ ref'd n.r.e.)

## CONCLUSION

For all the foregoing reasons stated herein, this appeal should be either dismissed or affirmed. Appellee prays that the reasonable attorney's fees and costs undertaken on his behalf as a result of this appeal be adjudged against Appellants.[32]

Respectfully submitted,

James G. Boyle
Counsel of Record for Appellee

[32]The judgment rendered below only covered attorney's fees incurred through the Texas Supreme Court.

ACCOUNT NO. _____

# TEXAS AUTOMOBILE RETAIL INSTALMENT CONTRACT

DATE 7-15-76

Buyer (and Co-Buyer) — Name and Address (Include County and Zip Code)

HRNulfo R. Zapata
P.O. Box 441 Driscoll TEX

Seller — Name and Address

Gates Ford
1300 E. Main
Alice TEX

Buyer (which means the undersigned Buyers and Co-buyers, jointly and severally) having been quoted both a deferred payment price and a lesser cash price hereby purchases from Seller on a deferred payment price basis, upon the terms and conditions set forth on the face and reverse sides hereof, the following property (hereinafter called the "Property") delivery and acceptance of which in good order hereby are acknowledged by Buyer.

| New or Used | Year and Make | Series | Body Style | No. Cyl. | If Truck Ton Capacity | Manufacturer's Serial Number | Use For Which Purchased |
|---|---|---|---|---|---|---|---|
| New | 1976 Ford | F150 | Pickup | 6 | | F15BLC62934 | ☑ Personal ☐ Agriculture ☐ Business ☐ |

INCLUDING:
☑ Radio ☐ Air Conditioner ☐ Automatic Transmission ☐ Power Steering ☐ Power Brakes ☐ Power Seats ☐ Power Windows ☒ Wmns Warranty

## DESCRIPTION OF TRADE IN

_____ (Year and Make) $_____ (Gross Allowance)

$_____ (Amount Owing)

## OPTIONAL INSURANCE

Buyer authorizes Seller to obtain the following insurance coverages:

(a) **Physical Damage Insurance:** Coverages checked below for a term of 24 months (or for such shorter term as the insurer to whom Seller shall apply therefor will provide for the amount included herein) from the date hereof, covering accidental physical damage to the Property based on actual cash value at the time of loss not to exceed policy limits payable to Buyer or Seller as interests may appear:

☑ $ AC Deductible Comprehensive ☐ Fire-Theft & Combined Additional Coverage
☑ $ 9.00 Deductible Collision ☐ Towing & Labor Costs ($25.00 Limit)
} $ 370.00 (a)

Physical Damage Insurance is required by this contract. If provided by Buyer pursuant to this contract, such insurance shall be payable to Buyer and Seller as interests may appear and shall provide coverage for the actual cash value of the Property at time of loss (i) for collision ($100 deductible unless a higher deductible amount is approved by Seller) and (ii) for fire, theft and combined additional or comprehensive coverage for the term of the contract; but, evidence of insurance for a lesser term will be acceptable provided the same is kept in force for the full term hereof. Buyer may choose the person through whom such insurance is to be obtained, and Buyer shall have the option of furnishing the required insurance through existing policies of insurance owned or controlled by him or obtained by him through any insurance company authorized to transact business in Texas.

☐ If checked, the premium for such insurance included herein is at a rate of charge not fixed or approved by the State Board of Insurance of Texas.

LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED.

(b) **Credit Life Insurance** on the life of HRNulfo R. Zapata (Insured Person) for the term of this Contract

☑ Provided under Ford Life Insurance Company's Group Policy No. 2200 in accordance with the "Credit Life Insurance Eligibility" section below. Insured Buyer's Age _____
☐ Provided by Ford Life in accordance with the separate Application Notice, Certificate or Policy delivered to Buyer this date.
} $ 145.92 (b)

(c) **Credit Accident and Health or Disability Insurance** provided by _____ for the term of this Contract in accordance with the separate Application, Notice, Certificate or Policy delivered to Buyer this date ..... $ 207.48 (c)

(d) **Other Optional Insurance** _____ (Itemize) ..... $ _____ (d)

**Total Cost of Optional Insurance** ..... $ 723.20

**NOTICE TO BUYER:** You are not required to obtain the Credit Life and/or Credit Accident and Health or Disability Insurance for which a charge is [illegible] only if signed by Buyer and dated).

## CREDIT LIFE INSURANCE ELIGIBILITY

Credit Life Insurance under Ford Life Insurance Company's Group Policy No. 2200 is available only on the life of one natural person who is obligated to make payments under this retail instalment instrument and who is under the age of 66 on the date hereof. Benefits will be limited to a refund of premiums if there is no person eligible for such insurance, or if death results from suicide within one year from the date hereof. For details see Notice of Proposed Group Credit Life Insurance on reverse side of Buyer's Copy.

The Insured Person (as defined in such Notice), in order to induce Ford Life Insurance Company to effect such insurance, hereby declares that to the best of his knowledge and belief he now is in good health and he hereby authorizes every physician or hospital, in the event of his death within one year from the date hereof, to disclose to Ford Life Insurance Company all information concerning his medical history prior to the date hereof.

The foregoing contract hereby is accepted by the Seller and assigned to Ford Motor Credit Company in accordance with the terms of the Assignment set forth on the reverse side hereof.

Seller _____

By _____ Title _____

## DETAILS OF TRANSACTION
## (INCLUDING DISCLOSURES REQUIRED BY FEDERAL LAW)

| | | |
|---|---|---|
| (1) Cash Price* | | $ 5154.00 (1) |
| Cash Down Payment | $ 1242.00 | |
| Trade In (See Opposite) | $ _____ | |
| (2) Total Down Payment | | 1242.00 (2) |
| (3) Unpaid Balance of Cash Price (Difference between Items 1 & 2) | | 3917.00 (3) |
| (4) Other Charges | | |
| Optional Insurance (See Opposite) | $ 723.20 | |
| Official Fees | $ _____ | |
| Taxes (Not included in Cash Price) | $ 206.00 | |
| License, Title & Registration Fees | $ 24.00 | |
| Total Other Charges | | $ 953.20 (4) |
| (5) Unpaid Balance — Amount Financed* (Sum of Items 3&4) | | $ 4870.20 (5) |
| (6) FINANCE CHARGE* | | $ 1250.04 (6) |
| (7) ANNUAL PERCENTAGE RATE | | 13.61 % (7) |
| (8) Total of Payments (Sum of Items 5 & 6) | | $ 6120.24 (8) |

(9) **Payment Schedule:** Buyer hereby agrees to pay to Seller the Total of Payments (Item 8 above) in 24 monthly instalments of $ 143.92 each and one final instalment of $ _____ on the like day of each month commencing Aug. 20 1976 or, if no date is specified, one month after the date of this contract.

(10) **Balloon Payment(s):** This Contract is not Payable in Installments of Equal Amounts.

☐ An installment of $ _____ will be due on _____
☐ Larger Installments will be due as follows:
$ _____ on _____ ; $ _____ on _____

(Insert amount of each payment that is more than twice the amount of any otherwise regularly scheduled equal payment) A balloon payment may be refinanced only upon such terms and conditions as the then parties to this contract may agree as of its due date.

(11) **Deferred Payment Price*** (Sum of Items 1,4 & 6) $ 6302.24 (11)

(12) **Delinquency Charges:** Buyer hereby agrees to pay a delinquency charge on each instalment in default for more than 10 days in the amount of 5% thereof or $5.00, whichever is less, plus such expenses incurred by Seller in effecting collection hereunder as may be allowed by law.

(13) **Security Interest:** Seller shall have a security interest under the Uniform Commercial Code in the Property (described above) and in the proceeds [illegible] the payment in cash of the Total of Payments and all hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method after first deducting an acquisition fee of $25.00. No rebate will be made if the amount thereof is less than $1.00.

(15) **Additional Terms and Conditions:** The additional terms and conditions set forth on the reverse side hereof are a part of this contract and are incorporated herein by reference.

**NOTICE TO THE BUYER — DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. YOU ARE ENTITLED TO A COPY OF THE CONTRACT YOU SIGN. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE TIME PRICE DIFFERENTIAL. KEEP THIS CONTRACT TO PROTECT YOUR LEGAL RIGHTS.**

Buyer acknowledges receipt of a true and completely filled in copy of this contract at the time of signing.

Buyer Signs _____

Co-Buyer Signs _____

APPENDIX

## ADDITIONAL TERMS AND CONDITIONS

**16. ASSIGNMENT**
The original Seller may assign this contract and his assignee shall acquire all of his interest in this contract and the Property and shall be entitled to all the rights and privileges of Seller hereunder. After Buyer receives notice of any such assignment, Buyer shall make all payments hereunder directly to the holder and the original Seller shall not be the agent of the holder for transmission of payments or otherwise. Buyer shall not transfer or otherwise dispose of any interest in this contract or the Property.

**17. USE OF PROPERTY – WARRANTIES**
Buyer shall keep the Property free from all encumbrances, and any amount that may be paid by Seller in release or discharge thereof shall be paid by Buyer to Seller forthwith upon demand with interest at the highest lawful contract rate. Buyer shall not use the Property illegally, improperly or for hire (unless stated herein) and shall not remove the Property from the county of his residence without the written permission of Seller. **No representation, promise or warranty, express or implied, has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller.**

**18. RISK OF LOSS – INSURANCE**
The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require. The inclusion of a charge for insurance herein shall not relieve Buyer of such obligation but only authorizes Seller to attempt to obtain the requested coverages on Buyer's behalf through an authorized agent; provided, if Seller is unable to obtain the requested coverages for the term indicated for the amount included herein, Seller may (i) obtain such coverages for such term, if any, as the insurance carrier to whom Seller shall apply therefor will provide for such amount, or (ii) credit such amount to the final maturing instalments hereunder in inverse order of maturity or as otherwise required by law.

If Buyer fails to obtain or maintain such insurance, or fails to furnish satisfactory evidence thereof upon request, Seller may, but shall not be required to, and without prejudice to his rights hereunder if he does not, obtain such insurance protecting either the interests of Buyer and Seller or the interests of Seller only. In such event, Buyer agrees to reimburse Seller for the cost thereof forthwith upon demand together with interest thereon at the highest lawful contract rate.

Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, and Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller.

**19. DEFAULT**
Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or Seller in good faith believes that the prospect of payment or performance hereunder is impaired, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and Seller shall have the right to repossess the Property wherever the same may be found with free right of entry, and to recondition and sell the same at public or private sale. Upon request, Buyer shall deliver the Property to Seller at a place designated by Seller. Seller shall have the right to retain all payments made prior to repossession and Buyer shall remain liable for any deficiency. Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession. Buyer agrees to pay reasonable attorneys' fees (15% if permitted by law) and other expenses incurred by Seller in effecting collection, repossession or resale hereunder. Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently. Waiver by Seller of any default shall not be deemed a waiver of any other default.

**20. GENERAL**
No transfer, renewal, extension or assignment of this contract or any interest hereunder, and no loss, damage or destruction of or to the Property, shall release Buyer from his obligations hereunder. This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller. Any provision of this contract prohibited by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract. This contract shall be governed by the laws of the state in which the original Seller is located as shown on the face of this contract.

## GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guaranties the prompt and unconditional payment, performance and discharge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upon demand the full amount remaining unpaid thereunder together with reasonable attorneys' fees (15% of the amount then due, or if prohibited, the amount permitted by law) if placed with an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change in the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payment thereof, or the release or non-perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. Each of the undersigned guarantors hereby waives notice of the acceptance of this guaranty, and of presentment, demand and protest and notices of non-payment and dishonor, and any other demands and notices required by law.

Guarantor _____ Address _____

Guarantor _____ Address _____

## FORD LIFE INSURANCE COMPANY
## NOTICE OF PROPOSED GROUP CREDIT LIFE INSURANCE

Notice is hereby given that if a charge for group credit life insurance is to be provided by Ford Life Insurance Company, Dearborn, Michigan under its Group Policy No. 2200 as separately stated as a part of the balance payable under the attached retail installment instrument, and if such instrument is assigned or otherwise transferred to Ford Motor Credit Company, the group policyholder, and if the person to be insured is eligible for such insurance as hereinafter provided, and if the person to be insured as provided in a statement that to the best of his knowledge and belief he now is in good health, life insurance coverage under the said Group Policy will be effective as to the person named as such in such instrument if such person is the person who will be eligible for insurance hereunder. In the event the person so named is not eligible for such insurance, the Insured Person will be: (a) if the Buyer named in such instrument is more than one natural person, the natural person whose signature as "Buyer" appears first, (b) if the Buyer named therein is a partnership, that natural person, being a partner, whose signature on behalf of the partnership appears first, or (c) if any Buyer named therein is a corporation, that natural person who is personally obligated on the instrument and whose signature as "Buyer" or "Co-buyer" appears first; provided that in the event there is no natural person obligated under such instrument under the age of 66 as of the effective date thereof, all provisions with respect to such credit life insurance will be void and of no effect. Such insurance will become effective from the date the obligation of the Buyer named in such instrument is incurred and will, in the absence of default in any payment coming due thereunder, remain in force, subject to the terms of the Group Policy, until discharge of all obligations thereunder. Any amount becoming payable at the option of the Insured Person will be applied to reduce or extinguish Buyer's obligation thereunder. The amount of insurance will be the amount owing from time to time under such instrument but not to exceed $10,000 less the amount of existing insurance as of the date of such instrument with respect to any other obligation to which the Buyer is insured under the said Group Policy [illegible] days. If the insurance is declined by the insurer or otherwise does not become effective, or if a change for an amount of insurance in excess of the foregoing limit is made, notice thereof will be sent to the Buyer and the appropriate portion of the charge for such insurance together with the time price differential applicable thereto promptly will be credited or refunded to the Buyer. In the event such insurance terminates during the [illegible] Insured Person, the portion of the insurance charge applicable to the period subsequent to the date of termination will be refunded or credited to the Buyer. No refund or credit of insurance charge will be made if the amount thereof is less than $1.00. The insurance charge refund formula is on file with the state official having supervision of the proposed insurance and a copy thereof is on file with the group policyholder. FL 13032 674 (3.83)

**THE ABOVE NOTICE APPLIES ONLY IF A CHARGE FOR CREDIT LIFE INSURANCE UNDER FORD LIFE INSURANCE COMPANY'S GROUP POLICY NO. 2200 HAS BEEN STATED IN THE ANNEXED INSTRUMENT. IF A CHARGE FOR OTHER CREDIT LIFE INSURANCE OR OTHER INSURANCE HAS BEEN INCLUDED THEREIN, BUYER WILL BE FURNISHED WITH SUCH APPLICATION, NOTICE, CERTIFICATE OR POLICY WITH RESPECT THERETO AS IS REQUIRED BY LAW.**

FMCC 11742 May 76

**Best Copy Available**

## APPENDIX B

**No. 279,722**

| | |
|---|---|
| ARNULFO R. ZAPATA | § IN THE 53RD JUDICIAL |
| | § |
| V. | § DISTRICT COURT |
| | § |
| YATES FORD AND | § OF TRAVIS COUNTY, TEXAS |
| FORD MOTOR CREDIT | § |
| COMPANY | § |

DEFENDANT'S ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Ford Motor Credit Company, Defendant in the above styled and numbered cause, and in answer to the allegations contained in Plaintiff's Original Petition alleges and at the trial hereof will show as follows:

Defendant denies all and singular the allegations contained in Plaintiff's Original Petition and demands strict proof of the same.

WHEREFORE, Defendant prays that the Plaintiff take nothing by his suit and that the Defendant have judgment for its costs.

CLARK, THOMAS, WINTERS & SHAPIRO

BY: /s/ _____

Tom Curtis

P.O. Box 1148
Austin, TX 78767

ATTORNEYS FOR DEFENDANT FORD MOTOR CREDIT COMPANY

## APPENDIX C

**No. 279,722**

| | |
|---|---|
| ARNULFO R. ZAPATA | § IN THE 53RD JUDICIAL |
| | § |
| V. | § DISTRICT COURT |
| | § |
| YATES FORD AND | § OF TRAVIS COUNTY, TEXAS |
| FORD MOTOR CREDIT | § |
| COMPANY | § |

### FIRST AMENDED ANSWER OF DEFENDANT, YATES FORD, INC.

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Yates Ford, Inc., one of the Defendants in the above entitled and numbered cause, and in reply to Plaintiff's Second Amended Original Petition, this defendant would show unto the Court the following:

I.

This Defendant excepts and objects to Plaintiff's Second Amended Original Petition, and particularly to Paragraph VIII of said petition wherein it is alleged that "Defendants' misrepresentations constitute false and misleading practices in violation of the Texas Deceptive Trade Practices Act, Tex. Bus. & Comm. Code. 17.46 (a) and Sec. 17.46 (b)(12), V.A.T.S." for the reason that said allegation does not state with particularity the type of deceptive practices on which the Plaintiff shall rely, and therefore, fails to inform this Defendant of the kind or character of evidence to which this Defendant must de-

fend. Yates Ford, Inc. would show that the pleading and the allegation of the Plaintiff above described fails to meet the requirements of the Texas Rules of Civil Procedure, in that said pleadings does not adequately inform this Defendant of sufficient facts on which the Plaintiff will rely so as to put this Defendant on notice of the particular claims that Plaintiff asserts. Of which special exception, this Defendant prays judgment of the Court.

II.

This Defendant excepts and objects to Plaintiff's Second Amended Original Petition, and particularly to Paragraph IX of said petition, wherein it is alleged that "Plaintiff is entitled to declaratory relief against Defendants" for the reason that said allegation fails to inform this Defendant of the nature and type of declaratory relief to which this Plaintiff should be entitled. Defendant would further show that unless it is put on notice, it cannot respond to the allegations of the Plaintiff and it cannot properly defend its case. Of which special exception, this Defendant prays judgment of the Court.

III.

This Defendant denies each and every, all and singular, the allegations of Plaintiff's Second Amended Original Petition and says that the same are not true in whole or in part, and therefore, demands strict proof thereof.

IV.

Pleading further if such be necessary, this Defendant would show that any omissions or alleged defects in said installment contract, and particularly any omissions or alleged defects in that part of the contract completed by

this Defendant, resulted from clerical inadvertence, accident or mistake that was done in good faith compliance and without any intent to harm the Plaintiff. This Defendant would show that such omissions or defects, if any, constitute accidental and bona fide errors, to which this Defendant should not be held liable or accountable.

V.

Pleading further, this Defendant asserts the doctrine and defense of "De Minimas non curat lex," and would show that if any such defects or omissions are found to exist in said contract, that such defects and/or omissions, if any, are of such a character that they should not give rise to a recovery by the Plaintiff against this Defendant.

WHEREFORE, PREMISES CONSIDERED, this Defendant prays that Plaintiff take nothing, and that this Defendant have its reasonable attorney's fees and Court costs in accordance with Tex. Bus. & Comm. Code, Sec. 17.50A, V.A.T.S., and and that it go hence without day.

Respectfully submitted,

PERKINS, ODEN, WARBURTON, McNEILL & ADAMI
Post Office Drawer 331
Alice, Texas 38332

By/s/ _____
J.G. Adami, Jr

## APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Filed
May 20 1980
CHARLES W. VAGNER, Clerk
By Deputy

| | | |
|---|---|---|
| JOSE GUTIERREZ and MANUELA GARCIA | § | |
| | § | |
| v. | § | Civil Action No. |
| | § | A-77-CA-174 |
| McMORRIS DOWNTOWN FORD, INC. and Ford MOTOR CREDIT COMPANY | § | |

### MEMORANDUM OPINION AND ORDER

Came on this day for consideration by the Court defendant Ford Motor Company's motion for new trial or for alteration or amendment of judgment, and the Court is of the opinion that said motion should be granted in part and denied in part. It is accordingly ORDERED that the Memorandum Opinion and Order entered by this Court on April 3, 1980, be and hereby is, VACATED, and the following is substituted therefor:

Came on this day for consideration by the Court plaintiffs' motion for partial summary judgment, and the Court is of the opinion that said motion should be granted in part and denied in part. This is an action for statutory penalties and attorneys' fees under the federal Truth in Lending Act (15 U.S.C. § 1601 *et seq.),* Regulation Z pro-

mulgated thereunder (12 C.F.R. § 226) and the Texas Consumer Credit Credit Code (Article 5069, V.A.T.S.). Plaintiffs have settled their claims against defendant McMorris Ford, which has been dismissed from this case, and the motion now before the Court concerns only defendant Ford Motor Credit Company. Plaintiffs seek summary judgment as to the following issues:

1) Whether the credit agreements entered into by plaintiffs for the purchase of two vehicles violated the federal act and Regulation Z in the following respects:

a) by failing to itemize the charges for license, title and registration fees;

b) by failing to include the above charges in the finance charge, thereby resulting in a stated finance charge and annual percentage rate which was erroneous; and

c) Whether the credit agreements violated the state statute in the following respects:

a) by providing for a waiver of the buyers' rights of action against the seller or holder or any person acting therefor for any illegal act committed in the repossession of the vehicles; and

b) by providing for an agreement that the buyers would not assert against the seller or holder any claim or defense arising out of the sale.

Involved herein are two credit agreements for the purchase of motor vehicles entered into by plaintiffs and defendant McMorris Ford and assigned to Ford Credit. One of these agreements was executed on October 4, 1976, and involved only plaintiff Gutierrez; the other agreement was executed on October 18, 1976, and was entered into by

both plaintiffs. The agreements are identical in all material respects, as are the legal issues pertaining thereto.

Defendant Ford Credit urges that it cannot be held liable on any of plaintiffs' claims because it is not a "creditor" as that term is defined in the federal act and Regulation Z, nor a "seller" as that term is defined in the state statute. Ford Credit also contends that plaintiffs have no cause of action under either federal or state law, because the credit agreements in question were rescinded some two months after execution. The Court cannot agree that Ford Credit is not a "creditor" within the meaning of the federal act and regulations, nor is it persuaded that there exists a genuine dispute as to this issue. The parties' answers to interrogatories and requests for admissions, as well as the other material on file in this action, show quite clearly that Ford Credit was a "creditor in this transaction as that term is defined in 12 C.F.R. § 226.2(s). *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 514-15 (5th Cir. 1976). The Court is also of the opinion that Ford Credit may be held liable under the Texas act, regardless of whether it may be properly characterized as "seller." Plaintiffs allege that defendants violated Article 7.07(4) and (6) of the state statute, both of which impose certain duties on the "seller or holder." As holder of the credit agreements herein, Ford Credit may be held liable under those provisions and Article 8.01. *Horn v. Nationwide Financial Corp.*, 574 S.W.2d 218, 220 (Civ. App. – San Antonio 1978, writ ref'd, n.r.e.). Defendant Ford Credit also asserts that the execution of two documents styled "Voluntary Surrender" constituted recissions of the contracts in question, thereby precluding any recovery by plaintiffs. Although plaintiffs take issue with Ford Credit's characterization of those documents as rescissions of the contracts, the Court need not decide that question, inasmuch as rescission does not

bar recovery under the federal act, *Sellers v. Wollman,* 510 F.2d 119, 123 (5th Cir. 1975), and Ford Credit has not cited any authority which would require a different result under Texas state law. The Court is not persuaded by Ford Credit's argument that *Sellers* is inapposite because it involved the buyer's statutory right to rescission rather than voluntary rescission. Even if the "Voluntary Surrender" documents are sufficient to constitute rescissions of the credit agreements, which the Court declines to decide, the Court is nonetheless of the opinion that plaintiffs may sue for statutory damages. *See Philbreck v. Timmers Chevrolet, Inc.,* 361 F.Supp. 1255, 1257 (N.D. Ga. 1973), *rev'd on other grounds,* 499 F.2d 971 (5th Cir. 1974)

Plaintiffs' claim that Ford Credit's failure to itemize individually the license, title and registration fees in the credit agreements constituted a violation of the federal act and Regulation Z is without merit. *Downey v. Whaley-Lamb Ford Sales, Inc.,* 607 F.2d 1093 (5th Cir. 1979); *Knighten v. Century Dodge, Inc.,* 607 F.2d 1096 (5th Cir. 1979). Likewise, plaintiffs' contention that the security interest retained by defendants is inadequately described is not well-taken. The credit agreements in question state that the "[s]eller shall have a security interest under the Uniform Commercial Code . . ." This description is sufficient to satisfy the requirements of 12 C.F.R. § 226.8(b)(5), on which this claim of plaintiff is based. *Anthony v. Community Loan & Investment Corp.,* 559 F.2d 1363 (5th Cir. 1977). The particular rights of a secured party are not required to be disclosed. *Grant v. Imperial Motors,* 539 F.2d 506 (5th Cir. 1976).

Plaintiffs also claim that defendants violated the state statute in that the provisions of the credit agreements which are concerned with waiver of the buyers' rights in

personalty found in the vehicles upon repossession are in violation of Article 5069-7.07(4) and (6), which provide, in pertinent part, as follows:

"No retail installment contract or retail charge agreement shall:

* * * * * *

(4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the . . . repossession of a motor vehicle;

* * * * * *

(6) Provide that the buyer agrees not to assert against the seller or holder of [sic] any claim or defense arising out of the sale."

That portion of the credit agreements which plaintiffs contend violates the above statutory provisions is as follows:

> "Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."

Ford Credit, relying on *Tradewinds Ford Sales, Inc. v. Caskey*, _____S.W.2d_____, (No. 5395, Tex.Civ.App.—Eastland April 24, 1980), argues that the above does no more than define the bailor-bailee relationship in the event that personal property not subject to the mortgage is found in the vehicle. The Court is not in agreement with those decision and is of the opinion that the language of this clause is not reasonably susceptible of such an interpretation. *Cf. Martens v. General Motors Ac-*

*ceptance Corp.*, 584 S.W.2d 941, 943 (Tex.Civ.App.—Dallas 1979, no writ history). On the other hand, the Court is of the opinion that this clause does not violate Article 7.07(6) in that it does not affect the buyers' assertion of rights *arising out of the sales* of the vehicles. Consequently, plaintiffs are entitled to summary judgment as to their Article 7.07(4) claim, but not as to their 7.07(6) claim.

Plaintiffs also seek summary judgment as to claims raised in a supplemental memorandum in support of their motion for summary judgment, but not contained in their original complaint. The Court is of the opinion that these matters are not properly before it, and they will not be addressed.

Plaintiffs also seek summary judgment as to claims raised in a supplemental memorandum in support of their motion for summary judgment, but not contained in their original complaint. The Court is of the opinion that these matters are not properly before it, and they will not be addressed.

The parties also are in disagreement as to the proper measure of damages for the above violation on which the plaintiffs are entitled to summary judgment. First, plaintiffs urge that each of them is entitled to a separate statutory penalty for the violation in the credit agreement which they jointly signed. Although this would be true as to any violation of the federal act, *Davis v. United Companics Mortgage & Investment of Gretna*, 551 F.2d 971 (5th Cir. 1977), there is no conclusive authority on this issue under the texts statute. Nonetheless, the Court is of the opinion that each plaintiff is entitled to recover the statutory penalty under the Texas statute. *See Berryhill v. Rich Plan of Pensacola*, 578 F.2d 1092, 1100 (5th Cir. 1978). Ford Credit urges that whatever recovery plaintiffs

are entitled to must be reduced by one half because plaintiffs settled their claims against codefendant McMorris Ford. *See Palestine Contractors v. Perkins,* 386 S.W.2d 764 (Tex. 1965). The Court is of the opinion that Ford Credit's position is well taken, and the final judgment entered against it must be reduced accordingly. *See Desselles v. Mossy Motors, Inc.,* 442 F.Supp. 897, 903 (E.D.La. 1978). Consequently, the appropriate measure of damages in this case is as follows:

1) For plaintiff Gutierrez, for the violation of the Texas statute in the October 4 financing agreement . . . $1,646.50

2) For both plaintiffs jointly, for the violation of the Texas statute in the October 18 financing agreement ..... $6,193.04

TOTAL: $7,839.54

$7,839.54 divided by 2# $3,919.77, which is Ford Credit's total liability, plus attorneys' fees and costs of court. It is accordingly

ORDERED, ADJUDGED and DECREED that plaintiffs' motion for partial summary judgment be, and hereby is, GRANTED in part and DENIED in part, in accordance with this opinion;

it is FURTHER ORDERED that the judgment previously entered in this action pursuant to the Court's Memorandum Opinion and Order of April 3, 1980 be, and hereby is, VACATED;

it is FURTHER ORDERED that plaintiffs shall submit evidence as to the proper measure of attorneys' fees within ten (10) days of receipt of this Memorandum Opinion and Order by plaintiffs' counsel.

Entered the 20th day of May, 1980, at Austin, Texas.

/s/ _____

Jack Roberts
UNITED STATES SENIOR DISTRICT JUDGE

COURT OF CIVIL APPEALS NINTH SUPREME JUDICIAL DISTRICT BEAUMONT, TEXAS

**NO 8560**

FORD MOTOR CREDIT COMPANY, ET AL
*APPELLANTS*

V.

DEODORA S. CHAPA
*APPELLEE*

Deodora S. Chapa, appellee, filed this suit against Ford Motor Credit Company (FMCC) and D.C. Rachal Ford, Inc. (Rachal Ford), appellants, alleging various violations of Chapter 7 of the Texas Consumer Credit Code, *TEX. REV. CIV. STAT. ANN. art. 5069-7.01,* et seq. (1971). The trial court granted a partial summary judgment for appellee, and, upon stipulation of atttorney fees, entered a final judgment awarding appellee $1,715.12 plus stipulated attorney fees, from which this appeal has been perfected.

Appellee purchased a new 1975 Ford pickup truck from Rachal Ford on a credit basis. A retail installment contract, executed by appellee and Rachal Ford, was assigned to FMCC. The basic contract was on pre-printed forms prepared by FMCC and supplied to Rachal Ford. Appellee paid the entire contract price without default.

The primary question before this court is whether the language contained in Clause No. 19 of the contract violated *Article 5069-7.07(4)*. The clause in question reads as follows:

> "Any personalty in or attached to the Property when repossessed may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession."

Article 5069-7.07(4) provides:

> "No retail installment contract or retail charge agreement shall:
>
> > "(4) Provide for a waiver of the buyer's rights of action against the seller or holder or other person acting therefor for any illegal act committed in the collection of payments under the contract or agreement or in the repossession of a motor vehicle."

The trial court held the above-quoted language of the contract was a violation of *Article 5069.7.07(4)* and entered judgment for penalties based thereon. Appellants challenge the action of the trial court for the reasons that the language of the contract does not constitute a waiver of the buyer's rights and further attacks *Article 5069-7.07(4)* as being "unconstitutionally vague." We overrule both points.

The Supreme Court in *Zapata v. Ford Motor Motor Credit Company,* in an opinion delivered May 6, 1981 [____S.W.2d____(not yet reported except in 24 Tex. Sup. Ct. J. 376)], has held the identical clause in the install-

ment contract complained of in the case at bar clearly violates the provisions of *Article 5069-7.07(4)* and affirmed a judgment for penalties based upon such violation.

Appellants' argument under this unconstitutional point merely reiterates the argument urged under this first point. The Supreme Court rejected this argument and point of error in the *Zapata* case, and we now reject it under the unconstitutional point.

The judgment of the trial court is affirmed.

AFFIRMED.

It appearing to the court that the issues involved herein have been settled by clear authority of long standing and present no question or application of any rule of law of interest or importance to the jurisprudence of the State, it is ORDERED, pursuant to *TEX. R. CIV. P. 452,* that the opinion not be published.

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Harold R. Clayton
Associate Justice

Opinion delivered
May 21, 1981

# Appellee's Reply Brief

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-467

FORD MOTOR CREDIT COMPANY
AND
YATES FORD, INC.,

*Appellants,*

VS.

ARNULFO R. ZAPATA,

*Appellee.*

## APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

## REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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## QUESTIONS PRESENTED

1. Is the decision of the Texas Supreme Court here in conflict with the Due Process Requirements of the Federal Constitution, as those requirements are applied by this Court in *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964)?
2. Can Article 5069-7.07(4) of the Texas Consumer Credit Code, which prohibits contractual waivers of rights of action for illegal acts committed in a repossession, be constitutionally extended by court construction to prohibit waivers of rights of action for conduct arising subsequent to a repossession?

# TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Index of Authorities | iii |
| OVERVIEW OF APPELLEE'S MOTION | 2 |
| RESPONSE TO APPELLEE'S INTRODUCTORY STATEMENT | 3 |
| RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM | 5 |
| 1. Response to Appellee's waiver argument | 5 |
| 2. Response to Appellee's discussion of S.I.C. v. Mannix | 7 |
| 3. Response to Appellee's discussion of trespass ab initio | 8 |
| 4. Response to the matter of correction letters | 9 |
| CONCLUSION | 9 |
| CERTIFICATE OF SERVICE | 10 |

# INDEX OF AUTHORITIES

## Cases


| | Page |
|---|---|
| Ford Credit v. Blocker, 558 S.W.2d 493 (Tex.Civ.App.— El Paso 1977, writ ref'd n.r.e.) | 5 |
| Ford Credit v. Gamez, 617 S.W.2d 720 (Tex.Civ.App.— Eastland 1980, writ ref'd n.r.e.) | 4 |
| Milhouse v. Levi, 548 F.2d 357, 363 (D.C. Cir. 1976) | 6 |
| Nevels v. Harris, 102 S.W.2d 1046, 1049-50 (Tex. 1937) | 3 |
| O. R. Mitchell v. Bell, 528 S.W.2d 856 (Tex.Civ.App.— San Antonio 1974, writ ref'd n.r.e.) | 5 |
| S.I.C. v. Mannix, 557 S.W.2d 755 (Tex. 1977) | 7 |
| Simpson v. Phillips Pipe Line, 603 S.W.2d 307 (Tex.Civ.App. — Beaumont 1980, writ ref'd n.r.e.) | 8 |
| State v. Hogg, 72 S.W.2d 593 (Tex. 1934) | 6 |
| State of Missouri v. Gehner, 281 U.S. 313, 320 (1930) | 5, 6 |
| United States v. Jones, 527 F.2d 817, 819 (D.C. Cir. 1975) | 6 |
| United States v. Speers, 382 U.S. 266, 277, n.22 (1965) | 6 |
| Walker v. Temple Trust Co., 80 S.W.2d 935 (Tex. 1935) | 3 |


## Statutes


| | |
|---|---|
| 12 C.F.R. § 226.6(c) (1981) | 4 |
| 82 C.J.S. § 322(2) | 8 |
| Tex. Rev. Civ. Stat. Ann., Art. 5069-7.07(4) | 2, 3, 5, 6, 7, 9 |
| Tex. Rev. Civ. Stat. Ann., Art. 10(6) | 5 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-467

FORD MOTOR CREDIT COMPANY
AND
YATES FORD, INC.,

*Appellants,*

VS.

ARNULFO R. ZAPATA,

*Appellee.*

## APPEAL FROM THE SUPREME COURT OF THE STATE OF TEXAS

## REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.5 of the Rules of the Supreme Court of the United States, Appellants Ford Motor Credit Company and Yates Ford, Inc., file this Reply to Appellee's Motion to Dismiss or Affirm.

## OVERVIEW OF APPELLEE'S MOTION

The linchpin of Appellee's entire Motion was his argument that the 24-hour provision can be construed to violate Art. 5069-7.07(4) of the Texas Consumer Credit Code *if* the Court will assume that the underlying repossession of the motor vehicle is itself wrongful. *See*, pp. 8-9, 12, 14-15, and 19 of Appellee's Motion.[1]

The installment contract at issue, however, does not itself authorize or contemplate an unlawful repossession of the motor vehicle, or a repossession by unlawful means. Thus, Appellee's argument invites the Court to inject into the contract circumstances which are *not* contemplated thereby. It is hard to conceive of a contractual provision which might not be so broadened by resort to *unstated* and *hypothetical* circumstances that it would not embrace illegal as well as legal conduct. For example, a seller has a contractual right to collect payments in an installment sale. That provision does not give the seller the right to collect payments by force, fraud, theft or other unlawful means. If the buyer is permitted to test the legality of a contractual provision by speculating about *possible* unlawful applications of it, then even the seller's right to collect payment for his goods is in jeopardy under the Code. That is certainly not what the Legislature contemplated in adopting Section 7.07(4). Section 7.07(4) does not prohibit all waivers. Rather, it prohibits waivers

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[1] Appellee also speculated as to the various means by which an unlawful repossession may be accomplished. That speculation was accomplished by Petitioner's resort to various wrongful repossession cases, both in and outside of Texas. If the events in those cases are pertinent to a determination of whether the present contract language violates the Code, should consideration not also be given the many repossessions *lawfully* conducted each year by Ford Credit? Moreover, if Petitioner can look to events occurring in other cases and in other jurisdictions, why aren't the events of this particular transaction also crucial? This transaction involved no repossession, no seizure, no retention of even personalty and *no harm, be it actual, threatened or just perceived.*

of rights of actions for *illegal acts*. What is dispositive for purposes of this case is the fact that the contract in question does not contemplate the use of illegal means in effecting repossession. If the contract itself does not contemplate illegal means, the legality of the 24-hour provision under Section 7.07(4) should not be tested by assuming that such means will be used.

Moreover, the assumptions that Appellee asks this Court to make are not only contrary to the contract itself, but are also contrary to the well-established Texas rule that courts will *not* presume that parties intend to act illegally in performing their agreements. Rather, as the Texas Supreme Court has stated, "the rule is that men are presumed to have intended to obey the law *unless the contrary appears*." *Nevels* v. *Harris*, 102 S.W.2d 1046, 1049-50 (Tex. 1937) (emphasis added). *See also*, *Walker* v. *Temple Trust Co.*, 80 S.W.2d 935, 936-37 (Tex. 1935). ("It is presumed that in contracting parties intend to observe and obey the law.").

Finally, under Appellee's "presumption of illegality and bad faith," a lender would have to successfully anticipate all possible implications and hypothetical applications of the language he uses in his contract. That is not only a practical impossibility, but it heightens even further the constitutional problems of vagueness and notice at issue here.

## RESPONSE TO APPELLEE'S INTRODUCTORY STATEMENT

Appellee's Introductory Statement contains several false or irrelevant assertions. First, Appellee claimed at p. 5 that the 24-hour clause was "specially designed" to have a chilling effect on the buyer's rights. Appellee cited no evidence to support his characterization of Appellants' intent, because there is none. In fact, a reasonably short notification period is of material benefit to both the borrower and the lender since it is more difficult to recover items after the vehicle has been returned to the dealer and since delay in asserting a claim may make false or inflated claims more difficult to disprove. *See*, Appendix G-2/3 of Appellants' Jurisdictional Statement.

Appellee also contended that Ford Credit could have made the provision more apparent. But this is not a disclosure case, and there is nothing in the Code that requires any particular manner of disclosure relative to provisions dealing with repossession. Moreover, a lender's voluntary decision to place such a provision on the front of the contract and above the signature line might itself violate federal law by obscuring or detracting attention from information specifically required to be disclosed in that manner by the Truth-in-Lending Act.[2]

Appellee also contended that even if the buyer is aware of the notice provision, it is highly unlikely that the unsophisticated, the poor and the elderly would have any idea how to send a letter by certified mail. Again, that kind of speculation obscures the real issue. The question is not whether this Court could improve upon the notice procedure, or whether the provision is equally fair to all people in all situations. The issue is whether the contract provision itself waives "the buyer's rights of action against the seller or holder or other person acting therefore for any illegal act committed . . . in the repossession of a motor vehicle." The answer to that question is *not* illuminated by speculation on the relative merits of regular versus certified mail.[3]

Finally, Appellee asserted that under Texas law the Credit Code is to be liberally construed. That assertion is contrary to the numerous authorities cited at p. 18 of Appellants' Jurisdiction Statement and to an even more recent Texas decision. *See, Ford Credit* v. *Gamez*, 617 S.W.2d 720, 722 (Tex.Civ.App. — Eastland 1980, writ ref'd. n.r.e.). Appellee also ignored the long line of Texas Supreme Court cases holding that penal statutes

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[2] *See*, 12 C.F.R. § 226.6(c) (1981).

[3] Similarly, Appellee asserted that in unusual circumstances, e.g., repossession on a holiday or in the early hours of the morning, the notice period itself might be inadequate. *See*, pp. 5, 14-15, 20-23 of Appellee's Motion. Again, Appellants' submit that the legality of a retail installment contract ought not be measured by every extraordinary and unusual event that borrower's counsel is able to hypothesize.

are to be strictly construed, although he admitted that the Code is *penal* in nature. *See*, p. 18 of Appellants' Jurisdictional Statement. Instead, Appellee claimed that Tex.Rev.Civ.Stat.Ann., Art. 10(6) requires that a liberal construction be given. That article, however, says nothing about liberal or strict construction. Rather, it simply restates the longstanding rule of statutory construction that:

> "6. In all interpretations, the court shall look diligently for the intention of the Legislature, keeping in view at all times the old law, the evil and the remedy."[1]

## RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

### 1. Response to Appellee's waiver argument.

Appellee argued that Appellants cannot challenge the constitutionality of the Art. 7.07(4), because vagueness of the statute was not pled in the trial court below. Appellee misconceives Appellants' constitutional argument. Appellants do not claim the statute is impermissibly vague on its face. It is both clear and distinct (i.e., it applies only to waivers of illegal acts "committed in the repossession of a motor vehicle"). It was, however, rendered unconstitutionally vague by the trial court's *application* of it to events occurring after the repossession. It is not necessary to affirmatively plead such a defense in situations where the constitutional infirmity appears for the first time as a

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[1] Appellee also cited *O. R. Mitchell* v. *Bell*, 528 S.W.2d 856 (Tex.Civ.App. — San Antonio 1974, writ ref'd n.r.e.) and *Ford Credit* v. *Blocker*, 558 S.W.2d 493 (Tex.Civ.App. — El Paso 1977, writ ref'd n.r.e.) on this issue. However, *Bell* involved the issue of *whose* activites were covered by the Code, not *how* it was to be applied to those whose actions it did govern. The *Bell* defendant did not contest the fact that the contracts at issue failed to comply with the Code. Similarly, *Blocker* involved a *stipulated* Code violation, so that the Court was not required to decide or gauge the Code's scope once it was found to be applicable to the particular transaction in that case. There are *no* Texas cases applying a liberal construction test where the issue is, as here, whether a statutory violation has occurred.

result of the trial court's decision. *See, State of Missouri* v. *Gehner*, 281 U.S. 313, 320 (1930). To hold otherwise would effectively require the defendant to anticipate in advance the trial court's construction and application of the statute. *Id.* In circumstances such as these, a party need only raise the issue at the first opportunity. *Id.* Appellants have done just that here.[5]

Second, it is generally recognized that an issue may be raised for the first time on appeal where it is purely one of law and does not require further factual development. *Milhouse* v. *Levi*, 548 F.2d 357, 363 (D.C. Cir. 1976); *United States* v. *Jones*, 527 F.2d 817, 819 (D.C. Cir. 1975). The retroactive or post facto application of a statute or order to undisputed facts is a proper circumstance for the application of such a rule. *See, Milhouse* v. *Levi, supra.* Resolution of the constitutional issue in this case requires nothing more than the application of the statute to the contract in question. no new facts are being interjected into the case on appeal.

Third, even if Appellants could be said to have waived the constitutional issue as an affirmative defense on appeal, the issue would still be before the court as a necessary aid to the statutory construction of Article 7.07(4). Whether or not the statute applies to the contract in this case is the central issue on this appeal. In construing the statute, it is the court's duty to give the statute a construction that sustains its constitutionality. *State* v. *Hogg*, 72 S.W.2d 593 (Tex. 1934). The danger that a particular construction of a statute may impair its constitutionality must therefor be assessed as part of the process of statutory construction. In such circumstances, the fact that a constitutional issue was not raised in the lower court is no bar to considering it on appeal insofar as it is relevant to the particular problem of

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[5] *See*, p. 6 of Appellants' Jurisdictional Statement.

statutory construction. *See, United States* v. *Speers*, 382 U.S. 266, 277, n.22 (1965).[5]

**2. Response to Appellee's discussion of *S.I.C.* v. *Mannix*.**

Appellee claimed at p. 11 that the *Zapata* opinion did not rest solely on the doctrine of trespass ab initio. His Motion, however, did not state on what else it was based. Instead, he referred this Court to the case of *S.I.C.* v. *Mannix*, 557 S.W.2d 755 (Tex. 1977). In fact, *Mannix* is readily distinguishable from *Zapata*, and actually demonstrates the constitutional infirmities here. *Mannix* involved a contract clause which provided that:

> "Nothing shall prevent the Secured Party from removing [the property] from any premises to which same may be attached, upon default or breach of this Retail Installment Contract and Security Agreement or any part thereof, and the Debtor agrees to sustain the cost of repairs, if any, of any physical injury to the real estate caused by such removal."

The contract thereby freed the secured party from liability for damages caused by intentionally tortious conduct committed in the repossession itself, such as forceable entry to the buyer's home. Thus, the contract violated the literal terms of Section 7.07(4) (i.e. it waived a cause of action for an illegal act *committed in* a repossession), and there was no need in *Mannix* to extend the statute beyond its clear terms. Moreover, the *Mannix* contract itself expressly contemplated the use of force and the creation of damage to property during the act of repossession (i.e. "nothing shall prevent the Secured Party . . ."). Thus, the *Mannix* Court had no need to test the contract by resorting to hypothetical events not contemplated therein. Here, however, a violation of Section 7.07(4) may be upheld *only* by (1)

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[5] Appellee did not even raise his waiver argument before the Texas Supreme Court. Moreover, the constitutional issue of vagueness was pled at the trial court level in the companion case of *Ford Credit* v. *Caskey*, pending herein as No. 81-488, after the judicial willingness to improperly extend the Act was appreciated.

improperly extending the statute beyond its clear and unambiguous terms, and (2) by engaging in exotic and baseless speculation. *Mannix* neither explicitly nor implicitly justifies such constitutionally improper techniques.

**3. Response to Appellee's discussion of trespass ab initio.**

Appellee's short discussion of trespass ab initio is most important for what it ignored. First, Appellee ignored the well-settled rule that if statutory language is plain and unambiguous, there is no occasion for judicial construction and the statute must be given effect according to its plain meaning. *See*, 82 C.J.S., *Statutes*, § 322(2) at 577 (cases cited therein). Section 7.07(4) is plain and unambiguous, and there is no justification to even resort to a fiction like trespass ab initio in order to construe it.

Second, Appellee ignored the extended discussion of trespass ab initio itself at pp. 12-16 of Appellants' Jurisdictional Statement. Instead, he asserted that, prior to *Zapata*, the Texas Supreme Court had never repudiated the doctrine. That argument is disingenuous. The Texas Supreme Court, prior to *Zapata*, had never *adopted* the doctrine. Indeed, the doctrine has been expressly repudiated in every case to reach the Supreme Court since 1924. *See, Simpson* v. *Phillips Pipeline*, 603 S.W.2d 307, 309-10 (Tex. Civ. App. — Beaumont 1980, writ ref'd n.r.e.).[7]

Appellee also argued at p. 18 that, prior to *Zapata*, other Texas courts had found Section 7.07(4) violations regarding the 24-hour provision without resorting to trespass ab initio. That argument was apparently supposed to bolster Appellee's assertion that the result in *Zapata* was correct even without reliance to the trespass ab initio. Appellee failed to note, however, that

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[7] At pp. 17-18, Appellee's Motion gave brief reference to several early Texas cases discussing trespass ab initio. Those cases were discussed and distinguished in *Simpson* v. *Phillips Pipe Line, supra* at 309-10.

*those other courts gave no rationale at all* for extending Section 7.07(4) beyond its clear terms and thereby applying it to post-repossession events. If any thing, those cases only emphasize the lack of a fair basis for the statutory construction at issue.[8]

**4. Reponse to the Appellee's argument regarding of Correction Letters.**

At pp. 23-25, Appellee criticized Appellants for "willingfully and intentionally" choosing prior to the *Zapata* decision not to use the correction procedure provided by the Texas Credit Code. Appellee carefully ignored the fact that until the Supreme Court decided to review *Zapata, all* Texas Courts of Civil Appeals who had passed on the issue had held that the 24-hour provision did *not* violate Section 7.07(4).[9] Appellee can hardly expect Appellants to have confessed a violation of the Code through the correction procedure in the face of such favorable rulings.

## CONCLUSION

Appellee's reticence to discuss *this* case and the Supreme Court's decision in *this* case is perhaps understandable, because the evidence in this case reveals *no* real, threatened or even perceived harm, and the Texas Supreme Court's rationale here is startling to say the least. It is much easier for Appellee to engage in relentless speculation and to resort to gross and prejudicial views of all creditors as cadaverous shylocks and all debtors as aggrieved Antonios. Yet, such analysis would quickly transform the Credit Code into a plaintiff's "windfall" act in which one could readily be punished for his mere *status* as a lender. Such

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[8] The cases referred to at p. 18 were actually cited at p. 23 of Appellee's Motion. Contrary to Appellee's assertion, at least two of the cases were handed down *after Zapata* and in full reliance thereon.

[9] The Texas Court of Civil Appeals cases cited at p. 23 of Appellee's Motion were either decided *after* the Supreme Court granted writ of error in *Zapata* or after the *Zapata* decision itself. The federal civil court decision on the pendent issue of state law was, when issued, contrary to the then-unanimous view of the Texas appellate courts.

analysis is no more valid than the trespass ab initio rationale of the Texas Supreme Court opinion in *Zapata*. Appellee's arguments should be rejected, and the *Zapata* decision should be reversed.

Respectfully submitted,

.....

RANDALL A. HOPKINS
*Attorneys for Appellants*

**CERTIFICATE OF SERVICE**

I hereby certify that true and correct copies of the foregoing Reply to Appellee's Motion to Dismiss or Affirm has been sent to all parties required to be served herein, including James G. Boyle, 609 Stewart Title Bldg., 812 San Antonio Street, Austin, Texas 78701 and to the Attorney General of the State of Texas, Courts Building, Post Office Box 12548, Capitol Station, Austin, Texas 78711. Said copies were sent by certified mail, return receipt requested, on this .... day of November, 1981.

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RANDALL A. HOPKINS